



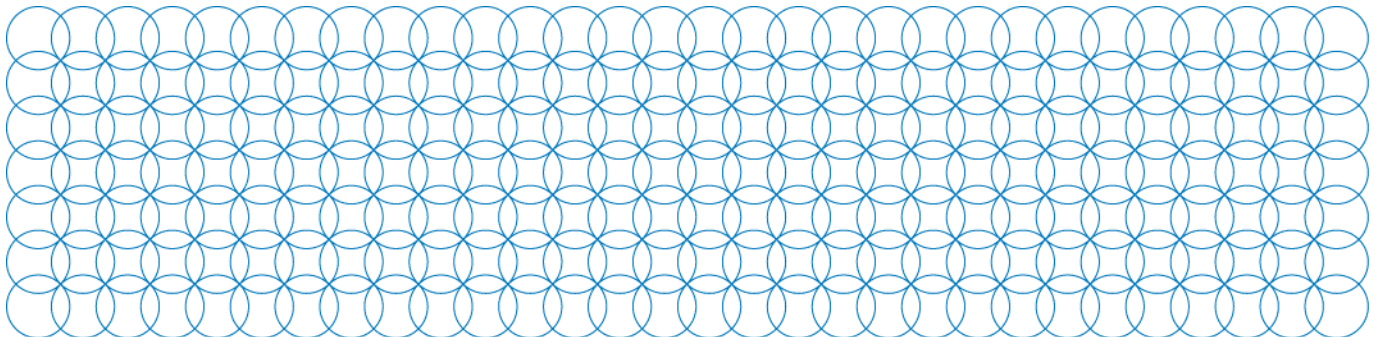
Ministry of  
**JUSTICE**

# Rome I - Should the UK opt in?

**Consultation Paper CP05/08**

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Department of  
**Finance and  
Personnel**

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**The Scottish  
Government**





Ministry of  
**JUSTICE**

## Rome I – Should the UK opt In?

A consultation produced by the Ministry of Justice, the Northern Ireland Department of Finance and Personnel and the Scottish Government, with the assistance of HM Treasury, the Department for Business, Enterprise and Regulatory Reform, and the Department for Transport.

This consultation is also available on the Ministry of Justice website at [www.justice.gov.uk](http://www.justice.gov.uk)



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## Contents

Foreword	2
Executive Summary	5
Part 1 - Introduction	7
Scope and Aim of this Paper	7
Overview	7
Background	8
Choice of Law in Contract	8
Devolution and Gibraltar	9
Involvement of Stakeholders in the Rome I Negotiations	10
Structure of this Consultation Paper	10
Nature of the Consultation Process	10
Part 2 – Present Position	11
The Rome Convention	13
The Commission Proposal	13
The Decision Not to Opt In	14
Rome I Negotiations	14
Part 3 – Assessing the Rome I Regulation	17
Policy Overview	17
Key Provisions	18
Article 3 - Freedom of Choice	19
Article 4 - Applicable Law in the Absence of Choice	20
Article 5 - Contracts of Carriage	23
Article 6 - Consumer Contracts	25
Article 7 - Insurance Contracts	28
Contracts Concluded by an Agent	31
Article 9 - Overriding Mandatory Provisions	31
Article 14 - Voluntary Assignment and Contractual Subrogation	33
Article 19 - Habitual Residence	35
Article 25 - Application in Time	36
Intra-UK Application	36

Conclusion	37
Questionnaire	38
About You	39
How to Respond	40
The Consultation Criteria	42
Consultation Co-ordinator Contact Details	43
Annexes:	
Annex A – Partial Impact Assessment	47
Annex B – Agreed Text of the Rome I Regulation as at 1 April 2008	59
Annex C – Consolidated Text of the Rome Convention 1980	93
Annex D – Comparison Table for Rome Convention and Rome I Regulation	107
Annex E – List of Consultees	129

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## Foreword

The UK is a major centre for international trade and commerce. UK law, courts and legal services have played a key role in cultivating this international reputation, which is underpinned by the certainty, predictability and fairness of our law of contract.

Since 1991, our choice of law rules in contract have been based on the Rome Convention. In 2005, the European Commission proposed fundamental changes to this regime. After consultation with stakeholders, we decided to take the exceptional step of exercising our right not to opt in to the proposal. We did this on the basis that we would continue to argue for a better Regulation that would meet the needs of business and consumers.

In the ensuing negotiations UK stakeholders, the Commission, Member States and their experts proposed changes. The product of these negotiations is a Regulation that protects the benefits of the Rome Convention, and in some cases improves upon it. We are very grateful to our stakeholders for their part in achieving this outcome. We now consider that the UK should seek to opt in to the Rome I Regulation and apply equivalent rules between UK jurisdictions.

We look forward to hearing your views on this proposal.



**BRIDGET PRENTICE**

**Parliamentary Under Secretary of State**



## Executive Summary

This consultation paper addresses the issue of whether the UK should opt in to the Rome I Regulation on choice of law in contract. The Government believes that the Rome I negotiations have resulted in an improved text, and that we should now seek Commission approval to opt in. Opting in to the Regulation will protect the benefits of the uniform system established under the Rome Convention and deliver some improvements.

Choice of law in contract is an issue affecting all UK businesses that enter into or advise on cross-border transactions as well as UK consumers buying goods or services from abroad. The scale of this economic activity is immense. The UK's financial markets alone deal with billions of pounds worth of international transactions on a daily basis. This business extends beyond the City of London, with Edinburgh and Glasgow (taken together) being among the ten largest European centres in several financial markets. Sound choice of law rules help to give traders, investors and consumers confidence in the legal effect of their contracts and underpin their value.

The 1980 Rome Convention established uniform rules for choice of law between EU Member States. Since its implementation in the UK through the Contracts (Applicable Law) Act 1990, it has generally been considered a success. In December 2005, the European Commission published its proposal to replace the Convention with a Regulation. Following consultation with stakeholders, the UK decided to engage in the negotiations but not to opt in to the proposal. Negotiations concluded in December 2007 and the Government is now considering whether the UK should seek to opt in to the Regulation, which will be adopted this year and come in to force 18 months later.

In overall terms, the Regulation is very similar to the Rome Convention. Both are built upon the same principles: a choice of applicable law for the parties in most circumstances, clear rules that apply in the absence of choice, a degree of flexibility for the courts, and appropriate protection for weaker parties such as consumers. The Articles that were of greatest concern to UK stakeholders during negotiations have either been removed, substantially revised or returned to their Convention form subject to later review. In the case of those provisions subject to review, future amendments will not automatically bind the UK.

The Rome I Regulation improves upon the Convention in a number of respects. Foremost among these is the improved drafting. A number of Articles have been clarified in light of the experience gained under the Rome Convention, including some

which have been comprehensively restructured to allow for clearer, more predictable outcomes. The Government welcomes these improvements.

By opting in to the Regulation, the UK would benefit from these improvements. In contrast, continuing to opt out would fail to preserve the benefits of the present system. New rules would apply throughout most of Europe, and UK businesses would be forced to adapt to them in the course of cross-border contracting, particularly with consumers. Only opting in would provide the benefits of Europe-wide uniformity.

The analysis in this consultation leads to the preliminary conclusion that the UK should opt in to the Rome I Regulation and apply similar rules to contracts connected to two or more jurisdictions within the UK. The Government wishes to test this conclusion by seeking the views of stakeholders. We welcome your comments on our conclusions and our analysis.

We would also welcome responses to the following questions:

- Q1 Is it in the national interest for the Government, in accordance with Article 4 of the UK's Protocol on Title IV measures, to seek to opt in to the Regulation? If not, please explain why.**
- Q2 Should the Rome I rules apply throughout the UK if the UK opts in to the Regulation? If not, please explain why.**
- Q3 Do you agree with the Partial Impact Assessment at Annex A of the consultation paper? If not, please explain why.**

## Part 1 - Introduction

### Scope and Aim of this Paper

1. In this paper we seek views on whether the UK should opt in to the Rome I Regulation and, as a related issue, whether the UK should adopt equivalent rules between UK jurisdictions. The purpose of the consultation is to inform the Government's consideration of these important issues.

### Overview

2. Rome I originated as a proposal by the European Commission to convert the 1980 Rome Convention on choice of law in contract<sup>1</sup> into a European Community Regulation<sup>2</sup>. The Commission's proposal was published in December 2005. The final agreed Regulation will be formally adopted in 2008 and its substantive provisions will come into force 18 months later.
3. In May 2006, the Government decided not to opt in to the original Rome I proposal because of its potential for adverse economic consequences. Nonetheless, the Government participated fully in the negotiations (though without the capacity to vote). Although the Rome I Regulation has yet to be formally adopted, the Council and the European Parliament agreed the text in December 2007. The Government believes that the problematic provisions in the original proposal have now been removed or amended satisfactorily and that the concluded text of the Regulation is an improvement on the Convention. The Government accordingly considers it desirable that the UK should seek to opt in to the concluded instrument. Should the UK opt in, existing policy suggests that the same rules should be adopted for issues arising between UK jurisdictions. The Regulation would also apply in Gibraltar.

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<sup>1</sup> Rome Convention on the Law Applicable to Contractual Obligations, 1980. See weblink: [http://www.rome-convention.org/instruments/i\\_conv\\_cons\\_en.htm](http://www.rome-convention.org/instruments/i_conv_cons_en.htm)

<sup>2</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) – COM(2005) 650 final, 2005/0261 (COD) published on 15 December 2005. See weblink: [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0650en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf)

## Background

### Choice of Law in Contract

4. Choice of law is an aspect of private international law. It determines which body of national substantive law should apply to a case with an international dimension. For example, a court may have to decide which law applies to a contract made between an English company and a German company for the construction of a gas pipeline through the Ukraine or a desalination plant in the Middle East.
5. The law to which a contract is subject determines its meaning and effect. If there is uncertainty as to the identity of the relevant law or its content, confidence in the ready enforceability of a contract will be undermined. The legal assessment of the meaning and enforceability of a contract will accordingly affect its value as an asset. UK law is the international law of choice for international contracts, particularly in the financial field, and was described as the world's gold standard by HM Treasury.<sup>3</sup> The UK therefore has a special interest in maintaining the legal certainty necessary for international commerce to thrive.
6. We are particularly conscious of the scale of business that is affected by the legal rules in this area. The overwhelming majority of cross-border financial transactions within the European Union are conducted in the UK, and the financial sector accounts for around 10% of UK gross domestic product. Related professional services account for a further 3.6%. The financial services sector, in turn, supports in excess of 1 million jobs. This business extends beyond the City of London, with Edinburgh and Glasgow (taken together) being among the ten largest European centres for banking, life insurance, pensions, and investment management. Cross-border contracts form an integral part of these financial instruments, and other forms of business. E-commerce, for example, is worth in excess of £100 billion per annum and cross-border sales form a significant part of that industry. Myriad other businesses, such as maritime shipping, rely on the clarity and enforceability of cross-border contracts.
7. A Partial Impact Assessment has been completed and indicates the areas most likely to be affected by the proposal. It concludes that in general terms the effect of the Regulation will be very similar to the effect of the Convention and is unlikely to lead to additional costs to business. The Impact Assessment

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<sup>3</sup> Financial services in London: Global opportunities and challenges (March 2006) p16. See weblink: [http://www.hm-treasury.gov.uk/media/6/8/bud06\\_cityoflondon\\_262.pdf](http://www.hm-treasury.gov.uk/media/6/8/bud06_cityoflondon_262.pdf)

is attached at Annex A. The Government's assessment of the Regulation as a whole is that it would be in the national interest for the UK to apply it. Not only have the initial problems with the Commission's proposal generally been resolved, but also in some respects the Regulation represents an improvement on the Convention.

8. The final text of the Regulation, recently produced by jurist-linguists, is set out at Annex B. Although the Regulation is yet to be formally adopted, we feel able to consult on the basis of that text.
9. If the UK were to decide to apply the Regulation, that decision would not undermine our future use of the Protocol to Title IV of the Treaty of the European Community. Should the reviews of the Regulation on the provisions relating to insurance, consumers or assignment result in new amending proposals, the UK can decide at that stage whether to be bound by those amendments.

## **Devolution and Gibraltar**

10. The UK consists of three separate jurisdictions: England and Wales, Scotland and Northern Ireland. Responsibility for the law of contract is devolved to each jurisdiction and, accordingly, choice of law rules for contract are devolved to the Scottish Executive and the Department of Finance and Personnel for Northern Ireland.
11. Gibraltar, though a British Overseas Territory, is subject to EU Regulations in this field. The UK has responsibility on behalf of Gibraltar for the negotiation of the relevant European instruments, and those instruments are directly applicable in Gibraltar if the UK decides to opt in. However, as Gibraltar holds legislative competence in this area, it will fall to the Government of Gibraltar to repeal the inconsistent provisions of their Contracts (Applicable Law) Act 1993 (which is broadly the same as the equivalent UK Act).
12. The Scots law of contract differs from English contract law, but Scots private international law is broadly similar. Northern Irish contract law and private international law are very similar to English law. If the UK opts in to the Rome I Regulation, it will apply to the whole of the UK. The relevant Ministers in Scotland and Northern Ireland have confirmed that they are content to consult on the basis of this paper.

## **Involvement of Stakeholders in the Rome I Negotiations**

13. Stakeholder input throughout negotiations on Rome I played an important role in achieving a positive outcome for the UK in the final Regulation. They provided expertise in the many technical areas covered by Rome I and lobbied on particular issues.
14. Stakeholder input has taken many forms, and has been received through regular meetings of the Ministry of Justice's Rome I Stakeholder Forum Group as well as through specialised meetings to address particular issues. Particular assistance was provided by the Financial Markets Law Committee (FMLC), the E-Commerce Regulatory Alliance Group and the International P&O Clubs (on maritime matters). In addition, HM Treasury and the Ministry of Justice carried out a consultation exercise with the insurance sector subsequent to the inclusion of insurance in Rome I. We wish to personally thank all stakeholders for their contribution to the final outcome.

## **Structure of this Consultation Paper**

15. Part 1 introduces the issues for consideration and provides background on the Rome I proposal. Part 2 examines the present position. Part 3 provides a detailed comparative analysis of the Articles of the proposed Rome I Regulation. It compares the Regulation with the equivalent provisions in the Convention and, where appropriate, the Commission's original proposal. Part 4 is a questionnaire.
16. The Partial Impact Assessment can be found at Annex A, with the full text of the agreed Rome I Regulation at Annex B. The text of the Rome Convention is at Annex C. A table presenting the key Articles of the Rome Convention, the Commission's original proposal on Rome I, and the concluded Rome I proposal is at Annex D. Annex E is a list of the principal organisations to which the consultation paper is being sent.

## **Nature of the Consultation Process**

17. The consultation is open to everyone, but is particularly aimed at key stakeholders, especially those involved in the regular use of cross-border contracts such as participants in financial markets and international business contracting in the UK.

18. This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of that Code. The consultation criteria, set out at page 42, have been followed.
19. As mentioned, copies of the consultation paper are being sent to those listed at Annex E. However, this list is not meant to be exclusive and responses are welcome from anyone with an interest in or views on the subject covered by this paper. This paper will also be available in electronic format from the Ministry of Justice website at [www.justice.gov.uk/publications/consultations.htm](http://www.justice.gov.uk/publications/consultations.htm).
20. Views are invited on the following questions:
- Q1 Is it in the national interest for the Government, in accordance with Article 4 of the UK's Protocol on Title IV measures, to seek to opt in to the Regulation? If not, please explain why.**
- Q2 Should the Rome I rules apply throughout the UK if the UK opts in to the Regulation? If not, please explain why.**
- Q3 Do you agree with the Partial Impact Assessment at Annex A of the consultation paper? If not, please explain why.**
21. These should be sent to:

Jean McMahon,  
International & Property Branch, Civil Law & Justice Division,  
HM Courts Service  
Point 4.23, 4<sup>th</sup> Floor, Selborne House,  
54 Victoria Street  
London, SW1E 6QW  
Email: [jean.mcmahon@hmcourts-service.gsi.gov.uk](mailto:jean.mcmahon@hmcourts-service.gsi.gov.uk)  
Fax: 020 7210 8681

by **25 June 2008**

Information may also be sought from the relevant devolved administrations:

Northern Ireland

Laura McPolin  
Civil Law Reform Division  
Departmental Solicitor's Office  
5th Floor, Victoria Hall  
12 May Street  
Belfast, BT 1 4NL  
Email: [laura.mcpolin@dfpni.gsi.gov.uk](mailto:laura.mcpolin@dfpni.gsi.gov.uk)

Scotland

Darren Burgess  
Civil and International Justice Directorate  
International and Human Rights Branch  
Scottish Government  
St Andrew's House  
Regent Road  
Edinburgh, EH1 3DG  
Email: [darren.burgess@scotland.gsi.gov.uk](mailto:darren.burgess@scotland.gsi.gov.uk)



## Part 2 – Present Position

22. In this part we outline the present position and describe the development of the Rome I Regulation.

### The Rome Convention

23. In 1980, Member States of the European Community entered into an inter-Governmental treaty to determine the law applicable to contractual obligations (the Rome Convention). The fundamental principle of the Convention is that parties are able to choose the law they want to apply to their contract (party autonomy). This principle, and the default rules in the Convention, ensures certainty as to the law that will apply to cross-border contracts. This autonomy is, however, not absolute. Where appropriate, provision was made for a degree of flexibility and for the protection of weaker parties. The Convention is generally considered to have been a success and was incorporated into UK law by the Contracts (Applicable Law) Act 1990, which came into force in 1991 and applied throughout the UK.<sup>4</sup>
24. The application of the Convention, however, is not entirely uniform. A number of States, including the UK, lodged reservations to Article 7 of the Convention. While the European Court of Justice was recently granted the capacity to review decisions under the Convention, there remains continuing uncertainty from the conflicting interpretations of the Rome Convention adopted in different courts.

### The Commission Proposal

25. In December 2005, the European Commission published its legislative proposal for a draft Council Regulation, known as the “Rome I Regulation”. The Commission’s primary purpose in bringing forward the proposal was to improve the current uniform choice of law rules in this area and their practical operability.
26. The initial proposal reproduced the Rome Convention system in many respects, often with updated language or structure. However, it also went

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<sup>4</sup> Contracts (Applicable Law) Act 1990.

See weblink: [http://www.opsi.gov.uk/acts/acts1990/UKpga\\_19900036\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts1990/UKpga_19900036_en_1.htm)

further. For example, the Commission proposed fundamental changes to the law applicable to consumer contracts, as well as entirely new provisions on contracts concluded by an agent and on voluntary assignment and subrogation. There were also structural changes to core provisions, such as the law applicable in the absence of choice. Taken together, the Commission proposal was not simply a transposition from one legal form to another with necessary updating.

### **The Decision Not to Opt In**

27. Following publication of the proposal in the official languages of the European Union, the UK had three months in which to decide whether to opt in to the negotiations. To inform this decision we sought views from stakeholders. Their response made clear that there were fundamental concerns about the Commission's proposal and the manner in which it had been prepared. The key concerns centred on aspects of the rules on party choice, default rules in the absence of choice, consumer contracts, contracts by an agent, mandatory rules, assignment and subrogation.
28. UK stakeholders, especially those involved in international finance and commerce, were concerned about the potential economic impact of several of the provisions. There was particular concern about the potential of the proposal to introduce significant legal uncertainty into complex, multi-party international contracts. Stakeholders considered that the Rome I proposal included several provisions that appeared to provide less satisfactory solutions than those under the 1980 Rome Convention. They were also concerned that the Commission had taken the decision not to carry out an impact assessment before finalising the proposal, which might have identified many of the problems revealed on our initial consultation.
29. In May 2006, having considered the views of stakeholders, the Government decided that, in accordance with the UK Protocol on Title IV measures, it would not opt in to the Rome I proposal. This meant that the UK would not be legally bound when the Council of Ministers adopted the Rome I Regulation.

### **Rome I Negotiations**

30. Notwithstanding the decision not to opt in, the Government acknowledged the advantage of a satisfactory pan-European instrument if it could be achieved and remained committed to participating fully (albeit without a vote) in negotiations on the text in the Council Working Group. The Government therefore took part in the negotiations with a view to securing improvements to the text of the Regulation. The Government took the position that it would later

seek to opt in to the Regulation if the UK's major concerns were satisfactorily resolved in the negotiations.

31. During the negotiations, two new provisions were proposed: contracts for the carriage of goods and passengers and insurance contracts. Both of these were initially problematic for the UK but solutions were found which represent an acceptable compromise.
32. On 7<sup>th</sup> December 2007, Justice and Home Affairs Ministers gave their political agreement to the text of the Regulation, which had already been endorsed by the European Parliament. This comprehensive joint agreement means that there will be no second reading of the Regulation in either body. The Council is expected to formally adopt the Regulation in April 2008. The Regulation will come into force 18 months after adoption (aside from the requirement that Member States report other international conventions on conflict-of-laws, which begins operating 12 months after adoption).
33. Although the UK will not be legally bound by the Regulation on its adoption by the Council, it will apply to all other Member States, except Denmark, which as a result of its own Protocol on Title IV measures is excluded altogether from participation in this area of co-operation. The UK may, however, seek the agreement of the European Commission to opt in to the adopted Regulation at any time. To inform its decision, the UK Government is conducting this consultation on the proposed Regulation and its impact.



## Part 3 – Assessing the Rome I Regulation

34. This part of the consultation document assesses the terms of the Rome I Regulation. It begins with an overview of the policy goals of Rome I, measured against the present situation. Thereafter, it addresses in detail a number of key provisions in the proposed Regulation. Where a provision mirrors the equivalent provision in the Rome Convention, and was not the subject of significant debate or concern during negotiations, it has been omitted. The part concludes by measuring the Regulation as a whole against the Rome Convention.

### Policy Overview

35. The Rome Convention as presently applied in the UK has successfully served a number of policy goals by providing party autonomy, legal certainty, flexibility and protection of weaker parties.
36. The guiding principle of the Rome Convention is party autonomy.<sup>5</sup> This principle enables parties to determine the law that will apply to their contract, generally by inserting a choice of law clause. This is a long-standing commercial practice, and results in the greatest predictability and certainty for the parties.
37. The second key objective of the Convention is to provide contracting parties with adequate legal certainty regarding the law that will apply to their contract. Where parties make a choice, and indeed where they do not, the legal effects of their contract should be reasonably certain. This has obvious pragmatic benefits in that it avoids the proliferation of litigation and the consequent burden on courts.
38. The primary objectives of choice and certainty are tempered by the need for flexibility and the importance of protecting weaker parties. As a result, the Rome Convention contains a number of displacement provisions, designed to ensure that where rules are inappropriate, a broader test of connection can be applied. The Rome Convention also modified the general rule of unlimited party choice in cases where one party, such as a consumer, held significantly less bargaining power.

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<sup>5</sup> See, for example, Article 3.

39. While the Regulation differs in some respects from the Convention, its overall policy orientation is the same. The guiding principle remains party autonomy, expressed in Article 3. Articles on specific types of contracts, such as consumer contracts (Article 6) or contracts for the carriage of passengers (Article 5(2)), have also retained party autonomy within specified limits. In both cases, the limitation of party autonomy has been established to secure better protection of consumers. Certain kinds of insurance contract follow the same scheme of circumscribed choice under Article 7(3). The Government believes a fair balance has been struck between party autonomy and protection of weaker parties.
40. The Regulation also maintains the requisite degree of flexibility. Generally, this is through the inclusion of displacement provisions that allow for a general test to override specific rules in certain circumstances. For example, displacement provisions are found in Article 4(3) on applicable law in the absence of choice and Article 5(3) on contracts of carriage. On the whole, we are of the opinion that the Regulation provisions deliver the same degree of flexibility as the Convention.
41. We also consider the Regulation a manifest improvement over the Convention in terms of legal certainty. Drafting improvements are apparent throughout the text, including in the structural reworking of Article 4. These improvements are accompanied by the helpful inclusion of Article 19, which defines the concept of 'habitual residence'.
42. Some of the benefits of the Rome I Regulation arise from its structure as a Community instrument, rather than the specifics of the text. In conflict of laws issues, the widespread application of similar rules can provide a benefit for those contracting across borders. In particular, maintaining a single system prevents the need for extensive legal advice. This benefit, presently provided by the Rome Convention, will be lost if the UK does not opt in, as the Regulation will apply in other Member States in any event. While the Convention and the Regulation are similar in many respects, maintaining two separate systems would increase complexity, especially for business. Moreover, the inclusion of choice of law in a Regulation better allows for amendment in the future as it is a Community legislative instrument rather than an international treaty (as in the case of the Rome Convention).

## Key Provisions

43. Having considered the overall effect of the Regulation we now consider its key provisions in detail.

### Article 3 – Freedom to Choose a Particular Law

1. A contract shall be governed by the law chosen by the parties.

The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
3. Where all other elements relevant to the situation at the time of the choice are located in a country other than a country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement.
4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate, as implemented in the Member State of the forum, which cannot be derogated from by agreement.
5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

44. This Article enshrines, as the cornerstone of the Regulation, the principle of party autonomy in relation to choice of law. This principle, which is also central to the Convention, is clearly important in delivering the benefits of legal certainty in international commerce.

45. The terms of this provision are substantively the same as those in Article 3 of the Convention. However, it contains two useful clarifications. First, it has been clarified that a choice of law by the parties need not be made only in express terms. It is now deemed sufficient if the choice is clearly demonstrated by the parties by reference to the terms of the contract or the circumstances of the case. Clarity as regards the additional flexibility available to parties is useful and reflects commercial practice in some instances. The current position under the Convention is not entirely clear on this point. The position under UK law, deriving from the Convention, is satisfactory in that Article 3 merely requires that a choice be demonstrated with “*reasonable*

*certainty*'. However this clarity is not reflected in all language versions. In particular, the French version of the Convention appears to require a higher level of certainty of choice; it refers to "*de façon certaine*". The removal of this element of uncertainty from the new text is therefore welcome.

46. The second element of clarification is in Recital 14 which states that:

*"An agreement of the parties to confer exclusive jurisdiction on one or more courts or tribunals of a Member State to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law was clearly demonstrated."*

This reflects, in general terms, the current position under UK law and it is useful for it to be explicitly incorporated into the Regulation as a recital, where it clarifies the operation of the provision. This is particularly so as there are many situations where international commerce contracts provide for the exclusive jurisdiction of UK courts in relation to the determination of future disputes and it is often desirable to align the applicable law with that of the jurisdiction chosen by the parties.

47. As a result of these clarifications, Article 3 of the concluded Rome I Regulation represents an improvement on the equivalent provision in the Rome Convention.

#### **Article 4 – Applicable Law in the Absence of Choice**

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
- (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
  - (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
  - (c) a contract relating to a right in rem<sup>6</sup> in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

<sup>6</sup> "in rem" means: against a thing, such as property, status, or a right, rather than against a person. Used of an action or a judgment.

- (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
  - (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
  - (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
  - (g) contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
  - (h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.
2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party who is required to effect the performance of the contract which is characteristic of the contract has his habitual residence.
  3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
  4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

48. This provision contains the general choice of law rules that operate where the parties have failed to make an effective choice under Article 3. At first sight, with its lengthy list of types of contracts, the provision may appear to differ widely from the equivalent rule in Article 4 of the Convention. However, its effect in practice is not likely to be significantly different from the way in which UK courts have applied Article 4.

49. The current provision in the Convention is based on a test involving the application of the law with which the contract is most closely connected. This test is then subjected to various presumptions. In addition, the Convention provides that these presumptions will not apply if it appears from the

circumstances as a whole that the contract is more closely connected with another country.

50. This conceptual structure is undesirably complex and inherently uncertain. It has allowed national courts in Member States to interpret the provision in divergent ways according to their differing national traditions. For example, the English courts have emphasised its flexibility and placed greater weight on the “*closest connection*” test, at the expense of the presumptions. Many Continental courts and the Scottish courts however, have taken the opposite view and emphasised the presumptions at the expense of the flexibility of the “*closest connection*” test. This divergence of approach has led to uncertainty, in particular as to how the provision would be interpreted by the European Court of Justice.
51. These problems should not arise in such an acute form under Article 4 of the Regulation. This adopts a different approach that is based on a much simpler structure. It proceeds by initially applying various specific choice of law rules for particular types of contract (paragraph 1). Where these rules are inconclusive, they are then subject to a general rule in paragraph 2. Further general displacement rules are found in paragraphs 3 and 4. The purpose of these provisions is to create the necessary degree of flexibility for those situations where the mere application of one of the specific choice of law rules would not, for various reasons, produce appropriate results. This mixture of specific rules, coupled with rules of displacement, strikes an appropriate and reasonably predictable balance between the competing objectives of certainty and flexibility. In this respect the provision can be regarded as an improvement on the equivalent provision in the Convention.
52. Two aspects of the new provision deserve particular attention. The first is the choice of law rule in Article 4(1)(h) which creates a specific rule for certain types of financial contract as defined in the Markets in Financial Instruments Directive (MiFID) (2004/39/EC). This instrument provides a harmonised regulatory regime for investment services across the Member States of the European Economic Area. The Government supported this rule, even though in most cases the applicable law in this context is clear from the specific choice of law made by the parties to the contract. We felt that this rule was desirable in order to preserve the high degree of legal certainty required in such international financial systems. This should ensure that, where parties have not chosen the applicable law, the default rule results in the application of a single law to govern such financial transactions.
53. The second aspect arises out of Article 4(3). This provides a rule of displacement for situations where it is clear from all the circumstances of the case that a contract is manifestly more closely connected with a country other

than the one indicated in paragraph 1 (that is one identified in accordance with the specific choice of law rules) or paragraph 2 (this is a rule to displace the choice of law rules in paragraph 1 in certain specific situations in favour of the law of the country of habitual residence of the party who is to effect the characteristic performance of the contract).

54. The rule in Article 4(3) provides for the application of the law of the country of “*closest connection*”. This should be of particular value in the context of related contracts where it is of commercial importance for a single law to be applied to the whole transaction rather than having different laws applying to each of the component parts of the transaction. Cases of this kind routinely arise in the context of letters of financial credit or bank indemnities. Further useful clarification of this issue is provided in Recitals 20 and 21:

*“In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of the habitual residence of the party which is required to effect the characteristic performance, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.”*

55. The improvement of the structure of this Article, and the clarifications provided, represent an improvement over the law under the Rome Convention.

## Article 5 – Contracts of Carriage

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable to such contracts shall be the law of the country of the habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.
2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the place where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to the contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

- (a) the passenger has his habitual residence; or
  - (b) the carrier has his habitual residence; or
  - (c) the carrier has his place of central administration; or
  - (d) the place of departure is situated; or
  - (e) the place of destination is situated.
3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

56. Paragraph 1 of Article 5, together with the general rule of displacement in paragraph 3, sets out the rules relating to contracts for the carriage of goods. These are broadly similar to those in the Convention (see Article 4(2)) and would appear to be generally satisfactory. In particular, freedom of the parties to choose the applicable law, which is routinely exercised in relation to contracts for the international carriage of goods, remains unaffected.
57. Paragraph 2, together with the general rule of displacement in paragraph 3, sets out rules relating to contracts for the carriage of passengers. The Rome Convention contains no special rules for such contracts either when the parties have chosen an applicable law or when they have not done so; consequently the rules in Articles 3 and 4 of the Convention apply. The inclusion of a special rule for such contracts in Rome I resulted from a desire by the majority of Member States to establish a greater degree of consumer protection in this field than currently exists under the Rome Convention.
58. Commercial operators made it clear that party autonomy was prevalent in this field. Such autonomy is provided for in the second indent in paragraph 2 where various permissible choices of law are listed. From the operator's perspective two of the available choices are likely to be of particular importance, namely the law of the country where the carrier is habitually resident (this concept is defined in Article 19) and the law of the country where the carrier has its place of central administration.
59. The availability of the former law should adequately cover situations where travel tickets are issued through an operator's head office. The availability of the latter law will be particularly useful for international operators in those frequent situations where tickets are issued through one of many branch offices situated around the world. This second option should prevent the undesirable and unmanageable proliferation of different laws that would otherwise reflect the fact that there may be many countries in which branches are situated. There may, however, be some marginal loss of business to UK-

based law firms which would otherwise service foreign carriers who wish to apply UK law to their contracts. This loss of business is unlikely to constitute a significant cost, as the number of foreign carriers that wish to select UK law is likely to be limited. In the light of this sufficiently liberal provision for party autonomy, the rules in paragraph 2 appear to strike a satisfactory balance between the interests of passengers and commercial operators.

## Article 6 – Consumer Contracts

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession ("the consumer") with another person acting in the exercise of his trade or profession ("the professional") shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
  - (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
  - (b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.
2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by such provisions that cannot be derogated from by contract by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.
3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.
4. Paragraphs 1 and 2 shall not apply to:
  - (a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;
  - (b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours ;
  - (c) a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

- (d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;
- (d) a contract concluded within the type of system falling within the scope of Article 4(1)(h).

60. The Commission's original proposal in relation to consumer contracts stated that in all cases falling within the scope of the rule, in particular wherever a consumer was habitually resident in a Member State, there should be no freedom for the parties to agree on the law applicable to the contract. The Commission proposed that in such cases the only law that should be applicable should be the law of the Member State where the consumer was habitually resident. This proposal marked a radical departure from Article 5 of the Convention which had provided that the parties should have a limited amount of party autonomy, provided that the law chosen did not deprive the consumer of the protection afforded to him under the mandatory rules of the law of the country where he or she was habitually resident.
61. The Commission's proposal caused widespread concern in those business sectors, in particular the small business and e-commerce sectors, which routinely provide goods and services to consumers in the European Union. It was felt that the new rule would represent a change that was not justified by the generally satisfactory operation in practice of Article 5 of the Convention. Such a change would place a requirement on businesses to research the entire law of contract in every country where goods and services were to be supplied to consumers. Fears were expressed that such a burden of "*due diligence*" would interfere with the operation of the internal market and in some instances even deprive consumers of goods and services currently sold to them by overseas suppliers.
62. In light of these concerns, the Government argued in favour of the restoration of the limited party autonomy available under the Rome Convention and welcomes its inclusion in Article 6(2) of the final Regulation. The Government's position on this issue was strongly supported in the European Parliament. The outcome should address the most serious concerns raised in relation to this Article and mean that the practical impact of the change is not significant.
63. A pre-condition to the application of the consumer protection established under Article 6(1)(b) is that the professional must have "*directed*", by any means, his commercial or professional activities to the country where the consumer is habitually resident or to several countries including that country. This criterion will apply to e-commerce transactions, and already appears in the Brussels I Regulation where it addresses jurisdiction in relation to

consumer contracts.<sup>7</sup> The Commission proposed that in light of this it would be appropriate to use it in the choice of law context too. For this reason, other Member States also generally supported its use.

64. To the extent that legal uncertainty exists in Article 6 of the Regulation, it seems matched by equivalent Articles in the Rome Convention. Article 5 of the Rome Convention refers to “*advertising*” in place of “*directing activities*” by the professional. In the absence of any conclusive ruling from the European Court of Justice as to whether, and if so how, this latter requirement applies to sales over the internet, there remains uncertainty as to the extent to which Article 5 currently applies to e-commerce. However, given the overall policy on consumer protection that clearly underlies this provision, it is probable that the European Court of Justice would interpret the concept as generally applying to e-commerce transactions. If this assumption is correct, then the application of the concept of “*directing activities*” under Article 6 of Rome I will not in itself result in significant change.
65. The scope of Article 5 of the Convention is currently restricted to contracts for the supply of goods and services. Article 6 of the Rome I Regulation, however, contains no such limitation. As a result, there was general agreement that special consideration should be given to certain transactions where it was particularly important that only a single law should apply. These transactions are excluded from Article 6 and, as a result, the parties can choose their law without restriction.
66. The most significant exclusions arise in the financial context and are referred to in Article 6(4)(d) and (e). The Government welcomes these exclusions and considers that they should adequately address the concerns of the financial sector and avoid any undesirable fragmentation of the applicable law in this important sector. These exclusions support the objectives of MiFID, which establishes a high level of harmonisation in this field, including an important degree of consumer protection.
67. In this field any limitation on the parties’ freedom to choose the applicable law could impose additional costs because of the need to assess different applicable laws in relation to contracts concluded with individuals from different Member States. These costs would inevitably, in some way, be passed on to consumers. This would be contrary to the underlying purpose of MiFID, which is intended to foster a thriving internal market in investment services and to deliver savings to MiFID regulated firms, and thereby to their clients. This is done by enabling such firms to rely on their home-state public and regulatory

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<sup>7</sup> Article 15 of EC Regulation 44/2001. See weblink: <http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:html>

law in their dealings throughout the European Economic Area. Recital 31 of the Regulation also clarifies that the Regulation does not prejudice the operation of a “system” within Article 2 of the Settlement Finality Directive (98/25/EC). The participants in a system of that type must be able to choose the law governing the system. An example of such a system in the UK is the CREST share settlement system.

68. Finally, as a general comment on Article 6 as a whole, it is likely that in the majority of cases where British businesses become involved in disputes with consumers habitually resident in the rest of the European Union (except in Denmark where the Regulation is not applicable) it will be the Regulation that will apply in any event. This reflects the fact that under Article 16 of the Brussels I Regulation consumers are generally entitled to bring their disputes in the Member States where they are habitually resident and in the majority of cases they will choose to do so.<sup>8</sup> The reason for this is that it will be significantly more convenient and cheaper for them to do so than to sue abroad. Accordingly, it will generally be the Regulation, and not the Convention that will apply in this context, regardless of whether the UK elects to become a party to the Regulation.
69. The restoration of some degree of party autonomy to consumer contracts in the final draft, combined with the specific provision for certain financial instruments should now address the concerns expressed by UK stakeholders. The proposal is now substantially in accord with the Rome Convention. The Government believes it strikes an appropriate balance between consumer and business interests.

## Article 7 - Insurance Contracts

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

<sup>8</sup> Article 16 of Brussels I. See weblink:: <http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:html>

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:
- (a) the law of any Member State where the risk is situated at the time of the conclusion of the contract;
  - (b) the law of the country where the policy holder has his habitual residence;
  - (c) in the case of life insurance, the law of the Member State of which the policy holder is a national;
  - (d) for insurance contracts covering risks limited to events occurring in one Member State, other than the Member State where the risk is situated, the law of that Member State;
  - (e) where the policy holder by virtue of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country in which the habitual residence of the policy holder is situated.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of the conclusion of the contract.

4. The following additional rules shall apply to insurance contracts for which a Member State imposes an obligation to take out insurance:
- (a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;
  - (b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, last subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.
6. For the purposes of this Article, the country in which the risk is situated is determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and, in the case of life insurance, the country where the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

70. Choice of law in relation to insurance is currently covered by both the Rome Convention (for direct insurance risks situated outside of the Community and all reinsurance risks) and the Insurance Directives<sup>9</sup> (for direct insurance risks situated within the Community). The original Commission proposal on Rome I envisaged that insurance should be dealt with in broadly the same way as under the Convention.
71. In December 2006, the Finnish and German Presidencies produced a proposal to include insurance in Rome I. This proposal was made at the request of a number of Member States who wished to see the subject covered comprehensively in Rome I in order to ensure that all the relevant applicable law rules were situated in one instrument. In doing so, however, the proposal also sought to make substantive changes.
72. As no impact assessment had been carried out on the inclusion of insurance in Rome I, the Government conducted a consultation with UK stakeholders. Stakeholders indicated that there was no pressure from consumers or the market to change the choice of law rules and any change would bring about transition costs. However, stakeholders also noted that the legal framework in relation to insurance was complex and combined complexity with inflexibility. Nevertheless, it was clear that before any change could realistically be made, a cost benefit analysis would need to be undertaken and any new rules would have to provide a significant improvement in certainty and predictability.
73. On this basis the UK argued for the retention of the status quo in negotiations. However, in order to reach an overall compromise, we felt able to accept a consolidation of the current rules (i.e. those of the Directives and the

<sup>9</sup> Consolidated Life Insurance Directive (Directive 2002/83/EC) and the 2<sup>nd</sup> Non-Life Insurance Directive (Directive 88/357/EEC). See weblinks. <http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:345:001:0051:EN:pdf> and [http://www.eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!prod!CELEXnumdoc&numdoc=388L0357&model=guitcheft&lg=en](http://www.eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!prod!CELEXnumdoc&numdoc=388L0357&model=guitcheft&lg=en)

Convention) in Rome I. The text of Article 7 appears to have achieved this objective and on this basis the substance of the current law has been retained. This was seen as a way of ensuring that all the relevant applicable law rules were situated in one instrument. It was also seen as a desirable objective in itself and as a means of facilitating future reform in this highly complex area of law. The Government regards this as a satisfactory outcome.

### **Contracts Concluded by an Agent**

74. In its original proposal the Commission included a specific provision on this topic which would have resulted in various changes of substance to the current position under the Convention. This provision was widely criticised by UK stakeholders and these criticisms were also voiced in other Member States. The Government is pleased to note that the provision has been removed from the Regulation and as a result the satisfactory position on contracts concluded by agents which currently operates under the Convention will continue to operate under the Regulation.

### **Article 9 – Overriding Mandatory Provisions**

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

75. Article 7(1) of the Rome Convention states that:

*“effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.”*

76. In accordance with its right under Article 22 of the Convention, the UK decided not to apply this rule on the basis that to do so would give rise to an unacceptable degree of legal uncertainty. Six other Member States decided to do likewise.
77. In their original proposal, the Commission proposed a provision in similar terms to that of Article 7(1) of the Convention which, given the required uniform application of Council Regulations, would not have been subject to any right of reservation by any Member State. The prospect of applying this provision gave rise to widespread concern in commercial circles, particularly in the City of London. These concerns turned once again on the likelihood of significant legal uncertainty and the extent to which the provision would undermine the key principle of party autonomy. This issue subsequently became a key factor in the Government's decision not to opt in to the Rome I proposal.
78. In light of these concerns, the Government's initial position in the negotiations was to seek deletion of this provision. During the course of negotiations, however, it became clear that it would not be possible to secure sufficient agreement on this amongst Member States as the majority already applied Article 7(1) of the Convention. Discussions then focussed on finding a generally acceptable compromise that would be narrower in scope than the Commission's original proposal and would keep any legal uncertainty to a minimum.
79. The final result of these negotiations is Article 9(3). This focuses on the discretionary application of certain rules of the country where the contract is to be or has been performed, which render the contractual performance unlawful. There is currently authority under English law (see *Ralli Bros. v. Cia Naviera Sota y Aznar* [1920] 2KB 287) that in similar circumstances, where the contract is governed by English law, it is to be unenforceable in accordance with the English law relating to the frustration of contracts. There is no conclusive English authority as to the situation where the law applicable to the contract is not English law. There is, however, another line of authority (see *Foster v. Driscoll* [1929] 1KB 470) under which illegality of contractual performance, in terms of the breach of a foreign law, may also prevent enforcement of a contract on the basis that to do so would be against the comity of nations and therefore contrary to English public policy.
80. The Government's initial assessment of Article 9(3) is that it represents a satisfactory outcome to the negotiations on this provision. Not only does it generally reflect the English law position in the light of the *Ralli Bros* decision, and to that extent should not introduce any significant additional uncertainty into the law, it also constitutes an improvement in terms of legal certainty over the existing law. This improvement is shown by the following:

- Article 9(3) removes the current uncertainty as to whether the European Court of Justice would consider that the old English jurisprudence could continue to be applied under the Convention in light of UK's reservation in respect of Article 7(1). In particular, it is unclear whether the *Ralli Bros* decision is consistent with that reservation and therefore properly remains available to our courts. It is also unclear whether the *Foster v. Driscoll* decision properly falls within the scope of the public policy rule and whether on that basis it remains available to our courts in light of the reservation.
- Article 9(3) is formulated in terms that are sufficiently broad to cover situations of unlawful contractual performance where the applicable law is foreign. There is no such clarity under English law.
- Article 9(3) now provides a uniform solution on this vexed topic for the whole of the European Union. This contrasts favourably with the situation under the Convention where no such uniformity exists. If the Member State in question has made a reservation in respect of Article 7(1) it is currently necessary to examine its national law in order to ascertain the true position in this area. On this basis, the new rule should create greater legal predictability for UK businesses in all cases where they are involved in contractual litigation in another Member State.

81. As a result of the negotiated changes, the Rome I proposal now represents an acceptable outcome. It is an intermediate point between the mandatory rules expressed in the Rome Convention, and the uncertain rules that prevailed in the UK as a result of the UK reservation to the Convention. In this respect, it compares well to the Rome Convention system.

## Article 14 – Voluntary Assignment and Contractual Subrogation

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person ("the debtor") shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.
2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.
3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

82. This Article deals with assignment, including in particular transactions that involve the assignment of debts contained in financial instruments. An example may help clarify the kind of situation which can typically arise in this context. Under a financial contract, governed by one law, a debtor undertakes to pay his creditor a sum of money. Under a later contract, governed by another law, that creditor assigns this right under the first contract to a third party.
83. The functions of Article 14 include identifying the law which regulates the legal relationship between the creditor and the third party and determines whether there is a valid contract of assignment between the creditor and that third party, the rights of those parties under that contract, whether they have complied with it and, if its terms have been breached, what remedies are available. The Article also identifies the law that will determine whether the creditor's rights are assignable under the first contract, and if so, under what conditions. The wide range of issues covered by this Article explains the critical importance for the financial markets that the rules are satisfactory.
84. Subject to some minor changes of a drafting nature, Article 14(1) and (2) reflect the substance of the equivalent rules in Articles 12(1) and (2) of the Convention. No changes of substance were intended and the Government considers that, on this basis, these provisions are satisfactory.
85. In its original proposal, however, the Commission suggested a further rule in this area to regulate the priority of successive assignments in respect of third parties. There is no equivalent rule in the Rome Convention; national law currently governs the matter. Under UK law the applicable law in such matters would be the law of the original claim and this remains the position notwithstanding that the claim may have been assigned several times. Under the Commission's proposed rule, the issue of priority would have been governed by the law of the country where the assignor was habitually resident. This proposal was widely criticised by stakeholders in the financial sector who considered that such a rule would make it difficult to ascertain the applicable law and would create serious problems for debtors in cases of successive assignments. This would lead to doubt on the ownership of the debt after an assignment and in some cases the debtor would not know to whom his debt was owed. A further criticism of the proposed rule was that it would create legal complexity by adding a further applicable law rule in addition to those that already applied pursuant to Articles 14(1) and 14(2). It was also feared that the additional costs arising out of this complexity would have adverse economic consequences for the financial markets.

86. In light of these concerns, the Government argued that priority issues should be governed by the law of the original claim. However, several Member States supported the Commission's proposal on the basis that it was an appropriate rule for one particular type of financial transaction, namely receivables financing or factoring. Intensive efforts were made to find a compromise solution that would in some way combine both approaches. In the end, and in the limited time available for an early agreement between the Council and the European Parliament, these efforts proved unsuccessful. It was therefore agreed that the provision should be deleted entirely. Accordingly the position for priority issues under the Regulation will remain unchanged.
87. Nonetheless, there is a desire to find a solution. The Regulation therefore requires the Commission to review this topic (Article 27(2)) and, if appropriate, come forward with draft legislation within 2 years of the Regulation coming into force. Given that the Regulation's entry into force is likely to take place in or about September 2009, the Commission's review of this area is likely to be completed around September 2011. In light of the importance of this area to the UK's financial sector, the Government intends to engage constructively with the review process. To that end it will consult fully with expert stakeholders in the field so that appropriate submissions are made to the Commission during its deliberations. In the interests of maximising legal certainty every effort should be made to ensure that, at the end of this review, there is an appropriate uniform rule that will operate throughout the European Union.

## Article 19 – Habitual Residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.  
  
The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
2. Where the contract is concluded in the course of operation of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such an establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
3. When determining the habitual residence the relevant point of time shall be the time of the conclusion of the contract.

88. The concept of habitual residence is central to the operation of the Rome I Regulation. It is helpfully defined in Article 19 as being, for legal persons, the place of central administration and, for natural persons, the principal place of business. In addition, there is an appropriate extension of the connecting factor for situations where the contract is concluded in the course of operations of a branch, agency or other establishment. The time at which the connecting factor must be ascertained is also fixed by reference to the time of the conclusion of the contract. These provisions contribute a helpful clarity to the functioning of the Rome I Regulation not present in the Rome Convention.

### **Article 25 – Application in Time**

89. This rule appropriately provides that the Regulation applies only to contracts concluded after the date when it comes into operation. It is a significant improvement on the Commission's original proposal that gave rise to the undesirable possibility of retrospective effect.

### **Intra-UK Application**

90. Consistent with the principle of subsidiarity, Article 22 leaves to Member States the decision as to what choice of law rules to apply between their internal jurisdictions. As a result, disputes that are connected to two or more of the jurisdictions of England and Wales, Scotland, and Northern Ireland can be subject to whatever choice of law rules the UK deems most appropriate. This limitation in Rome I recognises the proper boundaries of EU legislation.
91. At the time of the Contracts (Applicable Law) Act 1990, it was decided that the same rules should apply between UK jurisdictions as between the UK and other States. Since then, the Rome Convention rules have applied throughout the UK. This has not been the cause of any difficulties, and the arguments in favour of this approach continue to apply. The application of a single set of rules is substantially simpler than maintaining two sets, and there do not appear to be special circumstances that warrant different rules between UK jurisdictions. This approach will bring the same benefits to intra-UK cross-border traders as the Regulation will bring to exporters from the UK. As a result, the UK Government believes the long-standing policy of applying the same rules on choice of law within and without the UK should continue, and that the Rome I rules should be extended to reflect this position. The Government welcomes your views on this issue.

## Conclusion

92. The Regulation is an important piece of legislation with significant connections to international trade and commerce, and of special importance to the international financial markets. At the time the UK decided not to opt in to Rome I, there were fears that the proposal would undermine the certainty of domestic law with serious adverse financial consequences for the UK and EU. As this analysis of the provisions of the proposed Regulation and the partial impact assessment show, the degree of change caused by the Regulation will be relatively small and, on balance, beneficial. The Regulation will build upon the Convention rather than undermining it.
93. In assessing the relative merits of the Regulation, it should be recalled that a decision not to opt in would not prevent the application of the Regulation in other Member States. As a result, a decision to remain out of the Regulation would result in the creation of two systems – one for the UK and another for the rest of the European Community (except Denmark). Such a decision, therefore, would not preserve the advantages of the present system.
94. The Government's assessment of the Regulation as a whole is that it would be in the national interest for the UK to apply it, subject to gaining the approval of the Commission. Not only have the initial problems with the Commission's proposal generally been resolved, but also in some significant respects the Regulation represents an improvement on the Convention. Moreover, the maintenance of a single European instrument continues to be of benefit, as it was under the Rome Convention.
95. The present rules on applicable law in the case of cross-border contracts within the UK follow the terms of the Convention. If the UK opts in to the Regulation it would seem unnecessarily complicated to apply different rules within and without the UK. Should the UK opt in to the Regulation, the Government favours bringing the intra-UK rules into line with the Regulation.
96. The impact assessment at Annex A is a partial assessment. Any final assessment will be prepared at the conclusion of this consultation. We would particularly welcome further information to enable us to quantify the effect of opting in to the Regulation. We wish to know whether consultees agree with the Partial Impact Assessment at Annex A of the consultation paper.

## Questionnaire

97. In the light of this analysis and the Partial Impact Assessment, we would welcome responses to the following questions:
- Q1 Is it in the national interest for the Government, in accordance with Article 4 of the UK's Protocol on Title IV measures, to seek to opt in to the Regulation? If not, please explain why.**
- Q2 Should the Rome I rules apply throughout the UK if the UK opts in to the Regulation? If not, please explain why.**
- Q3 Do you agree with the Partial Impact Assessment at Annex A of the consultation paper? If not, please explain why.**
98. These should be sent to:
- Jean McMahon,  
International & Property Branch, Civil Law & Justice Division,  
HM Courts Service  
Point 4.23, 4<sup>th</sup> Floor, Selborne House,  
54 Victoria Street  
London SW1E 6QW  
Email: [jean.mcmahon@hmcourts-service.gsi.gov.uk](mailto:jean.mcmahon@hmcourts-service.gsi.gov.uk)
- by **25 June 2008**
99. An on-line questionnaire, which can be completed and returned on-line, can be found at <http://www.justice.gov.uk/publications/consultations.htm>.

**Thank you for participating in this consultation exercise.**

## About You

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## How to Respond

Please send your response by 25 June 2008 to:

Jean McMahon  
Ministry of Justice  
International & Property Branch, Civil Law & Justice Division  
Point 4.23, 4th Floor  
Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW

Tel: 020 7210 0787

Fax: 020 7210 8681

Email: [Jean.McMahon@hmcourts-service.gsi.gov.uk](mailto:Jean.McMahon@hmcourts-service.gsi.gov.uk)

### Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm>.

Alternative format versions of this publication can be requested from Jean McMahon, who can be contacted using the details above.

### Publication of response

A paper summarising the responses to this consultation will be published in Autumn 2008. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes

(these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

## Consultation Co-ordinator Contact Details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 7210 1326, or email her at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk).

Alternatively, you may wish to write to the address below:

**Gabrielle Kann**  
**Consultation Co-ordinator**  
**Ministry of Justice**  
**5th Floor Selborne House**  
**54-60 Victoria Street**  
**London**  
**SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper.



## ANNEX A: Partial Impact Assessment

### Summary: Intervention & Options

<b>Department:</b> Ministry of Justice	<b>Title:</b> Partial Impact Assessment of the EU Regulation on the law applicable to contractual obligations (ROME I)	
<b>Stage:</b> Final Proposal	<b>Version:</b> 3	<b>Date:</b> 31 March 2008
<b>Related Publications:</b> Ministry of Justice Consultation Paper 'Rome I – should the UK opt in?'		

Available to view or download at:

<http://www.justice.gov.uk/publications/consultations.htm>

Contact for enquiries: Jean McMahon

Telephone: 020 7210 0787

#### What is the problem under consideration? Why is government intervention necessary?

To consider whether the UK should opt into the Rome I Regulation. Government intervention is necessary if the UK is to gain the benefits of the updated rules on the law applicable to contracts, and to continue to benefit from the uniformity established by the 1980 Rome Convention.

#### What are the policy objectives and the intended effects?

To establish choice of law rules in relation to contractual obligations that are no less favourable to UK business and consumers than the current rules in this area. The rules should provide sufficient party autonomy, appropriate protection for weaker parties and the requisite degree of legal certainty and predictability.

#### What policy options have been considered? Please justify any preferred option.

**Option 1: Do nothing – remain outside the Regulation**

**Option 2: To opt in to the Rome I Regulation.** This is the preferred option. It will allow UK business and consumers to benefit from a single satisfactory set of choice of law rules. These rules will be applicable in all Member States of the European Union (except Denmark).

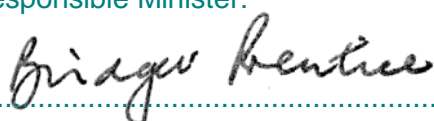
#### When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The European Commission is required to report to the European Parliament, the Council and the European Economic and Social Committee, on the application of the Regulation within 5 years of its entry into force. The UK will contribute to this review. The UK will also participate in the studies and evaluations to be carried out on specific topics by the Commission pursuant to the Regulation.

#### **Ministerial Sign-off** For consultation stage Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister:



Date: 2 April 2008

## Summary: Analysis & Evidence

<b>Policy Option: Opt in to Rome I:</b>	<b>Description: Opting in to the Rome I Regulation</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	<p>Description and scale of <b>key monetised costs</b> by 'main affected groups'</p> <p>The transition costs of familiarisation with the new Regulation for lawyers and businesses will be minimal, given that the Regulation is very similar to the Convention. Some business may be lost to UK law firms from foreign passenger carriers that can no longer choose UK law as applicable to their contracts. It is not possible to quantify these costs.</p>				
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 5px;"><b>One-off</b> (Transition)</td> <td style="text-align: center; padding: 5px;"><b>Yrs</b></td> </tr> <tr> <td style="padding: 5px;"><b>£ Minimal</b></td> <td style="text-align: center; padding: 5px;">0</td> </tr> </table>		<b>One-off</b> (Transition)	<b>Yrs</b>	<b>£ Minimal</b>	0
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	<b>£ Minimal</b>		0			
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 5px;"><b>Average Annual Cost</b> (excluding one-off)</td> </tr> <tr> <td style="padding: 5px;"><b>£ Minimal</b></td> </tr> </table>	<b>Average Annual Cost</b> (excluding one-off)	<b>£ Minimal</b>				
<b>Average Annual Cost</b> (excluding one-off)						
<b>£ Minimal</b>						
<b>Total Cost (PV)</b>		<b>£ Minimal</b>				
<p>Other <b>key non-monetised costs</b> by 'main affected groups'</p> <p>None.</p>						

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	<p>Description and scale of <b>key monetised benefits</b> by 'main affected groups'</p> <p>Opting in will avoid the costs associated with operating two legal regimes simultaneously. The improvements in drafting are likely to bring some benefits to cross-border contractors, including decreasing legal costs in the long term. It is not possible to quantify these benefits.</p>				
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 5px;"><b>One-off</b></td> <td style="text-align: center; padding: 5px;"><b>Yrs</b></td> </tr> <tr> <td style="padding: 5px;"><b>£ Nil</b></td> <td style="text-align: center; padding: 5px;">0</td> </tr> </table>		<b>One-off</b>	<b>Yrs</b>	<b>£ Nil</b>	0
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<b>Average Annual Benefit</b> (excluding one-off)						
<b>£ Moderate</b>						
<b>Total Benefit (PV)</b>		<b>£ Moderate</b>				
<p>Other <b>key non-monetised benefits</b> by 'main affected groups':</p> <p>Non-monetised public benefits of greater legal certainty, clarity and uniformity.</p>						

**Key Assumptions/Sensitivities/Risks** There is a low-level risk that the European Court of Justice will adopt an unexpected legal interpretation of the Rome I provisions. However, this risk presently exists under the Convention. This assessment assumes the Commission and Council of Ministers will accept the UK's opt in.

Price Base	Time Period	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £	
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What is the geographic coverage of the policy/option?	UK and Gibraltar			
On what date will the policy be implemented?	September 2009 (TBC)			
Which organisation(s) will enforce the policy?	N/A			
What is the total annual cost of enforcement for these organisations?	£ N/A			
Does enforcement comply with Hampton principles?	N/A			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ Nil			
What is the value of changes in greenhouse gas emissions?	£ N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro Nil	Small Nil	Medium Nil	Large Nil
Are any of these organisations exempt?	No	No	No	No

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)	
Increase of	£ Nil	Decrease of	£ Nil	<b>Net Impact</b>	£ Neutral

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Evidence Base (for summary sheets)

1. This impact assessment accompanies the Ministry of Justice consultation paper 'Rome I – should the UK opt in?'

### Proposal

2. The Government proposes that the UK should opt in to the Rome I Regulation and, as a consequence, denounce the 1980 Rome Convention and repeal the relevant provisions of the Contracts (Applicable Law) Act 1990, which came into force in 1991. In December 2005, the European Commission published its proposal for the Rome I Regulation, the purpose of which was to update the Convention and include choice of law rules in a new Community Instrument. The intended effect is, however, minimal. The Regulation should continue to serve the same policy objectives as the Convention: party autonomy, legal certainty, flexibility and protection of weaker parties.

### Background

3. Contracts are the basic legal building block of national and international commercial transactions. The law to which a contract is subject determines its meaning and effect. If there is uncertainty as to the identity of the relevant law or its content, confidence in the ready enforceability of the contract will be undermined. The 1980 Convention provides tried and trusted rules by which the applicable law can be determined.
4. The UK has a particular interest in the effect of choice of law rules because UK law, which delivers a high degree of certainty and clarity, is the international law of choice for international contracts, particularly in the financial field. The 1980 Convention is part of the legal framework that supports this activity, and any replacement rules must be no less advantageous to commerce.

### The Rome Convention

5. The fundamental principle of the Rome Convention is that parties are able to choose the law they want to apply to their contract (party autonomy). While the Convention provides a body of harmonised choice of law rules, its application is not uniform among all its signatories. For example, seven Member States do not apply Article 7(1) of the Convention.<sup>10</sup> The Convention is generally considered to have been a success.

<sup>10</sup> Germany, Ireland, Latvia, Luxembourg, Portugal, Slovenia and the UK

## Commission's Rome I Proposal

6. The Commission's proposed Rome I Regulation was not a mere update to the Rome Convention, but included a number of substantive changes. In view of the possible adverse impact of these changes, the UK Government, having consulted stakeholders, decided not to opt in to the proposed Regulation, but to nevertheless participate in negotiations. The principal areas of concern for the UK were aspects of the proposed rules on freedom of choice, applicable law in the absence of choice, consumer contracts, agency contracts, overriding mandatory provisions and assignment. Notwithstanding the UK's opt out of Rome I, the UK fully participated in negotiations.

## Choice of Law in Practice

7. In most international contracts, the choice of law will be specified by a simple clause stating, for example, 'this contract is made subject to the law of England and Wales'. This may be complemented by an equivalent clause vesting exclusive jurisdiction in the courts of one country in the case of a dispute.
8. Choice of law is not a matter overseen by Government and is for the parties to determine. As the contract law of different countries can differ substantially, parties may negotiate extensively to determine which law will apply to a given contract. However, once a law has been settled upon, it is generally a simple matter to make that choice legally effective.
9. In the vast majority of cases under the Convention and, were it to apply, the Regulation, a simple clause will suffice to give the necessary legal certainty and commercial confidence for the parties to contract efficiently. Where there is substantial legal uncertainty, allowance must be made for difficulties with the enforcement of a contract. Consequently, legal uncertainty can affect the value of a contract as an asset.

## The Impact of Rome I

### Methodology

10. The purpose of this impact assessment is to consider the effect of the Rome I proposal. The relevant point of comparison is the Rome Convention. As a result, a comparative methodology has been adopted which considers the Rome I Regulation against the baseline of the Rome Convention, rather than attempting to determine absolute costs or benefits, or comparing the Regulation against the earlier Commission proposal. While the final text of the Regulation is a significant improvement on the Commission's original proposal, a comparison undertaken on that basis would fail to take account of the fact that only two options are presently available. The comparative approach adopted, therefore, focuses on practical differences.
11. In comparing the two instruments, and assessing whether to opt in, some further points should be noted. In particular, the Rome I Regulation will apply in other Member States (except Denmark), even if the UK does not opt in to the Regulation. The practical effect of this is that UK businesses contracting with persons in other Member States will need to adjust to the application of the Regulation. To the extent that there are adjustment costs, these will be felt whether the UK opts in to the Regulation or not. In comparative terms, there is little difference in this respect.

12. Moreover, in a scenario where the Regulation applies in other Member States, and the Rome Convention in the UK, the EU-wide uniformity that is presently enjoyed will not continue. UK businesses would therefore be required to adapt to the operation of two systems. In this respect, remaining outside of the Rome I Regulation would not wholly maintain the benefits of the present Rome Convention system.
13. Given the extent of the similarities between the Regulation and the Convention, it is unsurprising that a comparative analysis reveals that the overall impact is slight. Many Articles retain the Convention system verbatim, whilst others alter its wording but not its effect. Moreover, as an analysis of policy goals demonstrates, the Regulation is built upon the same foundational principles as the Convention. It is only the provision on contracts for the carriage of passengers in which a difference is evident, and even then an initial comparison of commercial practice indicates the practical impact of the changes would be negligible.
14. The Government has been unable to quantify monetarily the benefits and costs of opting in to the Rome I Regulation in this Impact Assessment. This is for a number of reasons. In the absence of identifiable changes in commercial practice, it has proven difficult to assess the amount of particular costs or benefits. Similarly, choice of law rules are bound up with other aspects of contract law and not readily separable for statistical purposes. As choice of law rules form part of the contractual relationships between legal persons, there is also no direct governmental burden to quantify. Therefore, in the absence of general data on choice of law in contract and without evidence of change in commercial practice, we have adopted descriptive measures of the effects of the Rome I Regulation in this Impact Assessment. However, we would welcome further information from consultees to enable us to quantify the effect of opting in to the Regulation.

## **Policy Goals**

15. Given the similarities between the Regulation and the Convention, an Article by Article impact assessment is unwarranted. Rather, the operation of the Regulation is better illustrated through policy themes, referring to Articles where necessary, and assessing the impact in each field. Four themes are evident: party autonomy, legal certainty, flexibility and protection of weaker parties. In each case, the Regulation has either nil effect, or provides a small cost or benefit that is either non-monetised or very difficult to quantify.

### ***Party Autonomy***

16. Party autonomy is the principle that parties to a contract should be able to determine the law that will apply to that contract. Express choice of law is a standard term in commercial contracts, as it results in the greatest certainty as to the interpretation of the contract. In the absence of a good public policy rationale (for example, the need to protect weaker parties to a contract), this principle should be preserved to the maximum extent possible by choice of law rules. It is particularly important to the UK, as widespread party autonomy allows for the selection of UK law in foreign contracts and the consequent flow of business to local legal practitioners.
17. Article 3 of the Rome I Regulation provides for party autonomy in the same fashion as the Rome Convention, subject to minor amendments for clear application. As a result, the impact on commercial practice will be negligible – in the vast majority of cases, parties will continue to be able to decide the law applicable to their contracts exactly as before.

18. In those cases where party autonomy has been limited, it is generally in the name of protecting weaker parties, and is considered below.

### **Legal Certainty**

19. Legal certainty affects the value of contracts and the likelihood of litigation. Where legal rules are very clear, contracts are made with significantly lower risk of later difficulties, and parties are less likely to test legal rules in court.
20. The Rome I Regulation provides clearer rules than the Convention in a number of areas. Article 3 has been updated to clarify what constitutes a choice. Article 4 has been structurally revised so that its application is clearer. In the case of Article 4, this should help overcome the divergent styles of interpretation adopted in the courts of Member States. Article 19 provides a definition of habitual residence that makes the meaning of this concept clearer.
21. ***The accumulated impact of these changes is likely to be a small but unquantifiable decrease in legal costs.*** The market value of contracts will be maintained through continued confidence in their enforceability. Savings will be appreciable both for the parties to the contract and the courts of the Member State.

### **Flexibility**

22. In some cases, the certainty of legal rules must be tempered by a degree of flexibility. The importance of flexibility is most apparent where parties have not exercised their freedom to choose the applicable law. While Rome I provides default rules, the inflexible application of these rules could sometimes lead to unexpected results that do not properly reflect the expectations of the parties.
23. Flexibility and certainty are balanced in the Regulation through the use of 'displacement provisions'. These operate to override the usual rules in certain circumstances. For example, Article 4(3) provides for a different applicable law where 'the contract is manifestly more closely connected with another country'. Similar provisions are included in Article 5(3) on contracts for carriage.
24. ***The impact of the Regulation on flexibility will be negligible.*** The Regulation provides for reasonably flexible rules in the same fashion, and to the same extent, as the Convention.

### **Protection of Weaker Parties**

25. Both the Rome Convention and the Regulation make clear that free party choice is not appropriate in all circumstances. This is particularly the case where one party, such as a consumer, is not in an equal position to bargain about applicable law.
26. In these cases, the rules on applicable law protect the weaker party by circumscribing party autonomy. A number of provisions in Rome I operate on this basis. For example, employment contracts under both the Rome Convention and the Rome I Regulation allow for choice of law, but not such that the protections under local law are removed. In a similar fashion, consumer contracts under the Convention and under the Regulation allow for choice of law, but not such that the consumer is deprived of protection under their own law. ***In the case of consumer contracts and employment contracts, the Rome I Regulation is equivalent to existing law and the impact will be negligible.***

27. Protection of weaker parties has also motivated a change in the rules applying to contracts for the carriage of passengers under Article 5. Under the Rome Convention, there were no special rules for the carriage of passengers, and unfettered choice of law applied as a result. That is no longer the case under the Regulation, which sets out a limited list of valid choices, including the habitual residence of the carrier or passenger, the place of departure or destination, and the carrier's place of central administration.
28. The list of available choices was considered acceptable to the UK on the basis that it includes the place of central administration of the carrier, which is the law overwhelmingly favoured in contracts for the carriage of passengers. Ministry of Justice enquiries into carriage of passengers by ship and air revealed that all major UK operators that provided choice of law information publicly chose the law of their place of central administration.
29. To the extent the limitations have an effect on the UK, it will be by limiting the situations in which foreign carriers can choose UK law. Figures are not available on the extent to which this occurs, though there is no evidence that it is widespread. Nevertheless, in this limited field, ***there is a possibility of a small decrease in business directed to UK law firms by foreign carriers, resulting from a change in the choice of governing law.***

## Sectors and Groups Affected

30. All sectors and groups involved in international trade and commerce would be subject to Rome I, should the UK decide to opt in. In particular, the rules would apply to:
- **the legal profession** – specialist lawyers or law firms working on international contracts;
  - **financial sector** – any organisation involved in international contracting for financial purposes. This extends to trading in stocks and derivatives, insurance contracting, banking and related fields. The City of London has a particular interest. The City of London has, for example, more foreign banks than any other financial centre – over 250 of the 347 authorised banks in the UK are branches or subsidiaries of foreign banks.
  - **enterprises of all sizes** involved in international business transactions or those contemplating new business links with overseas traders;
  - **consumers involved in contracts**, such as those purchasing goods or services from abroad by contract, including over the internet; and
  - **employees** – those who are employed on contracts which involve working abroad, such as those employed on ships that spend significant periods of time at sea or elsewhere in the world.

31. The manner in which private international law rules of this kind can affect some of these groups can be illustrated through a case study:

### **Choice of Law – A Case Study**

A contractual relationship between an English company and a Spanish company breaks down. On consultation with their lawyers, the English company discovers that there is some legal ambiguity over whether early representations in negotiations constituted a choice of law, and over which law will apply if no choice has been made. If English law is not chosen, then the English company stands to lose £20 million. If there is a 10% chance that litigation will result in the application of English law, then the English company will litigate so long as their legal costs do not exceed £2 million. Moreover, should the two companies settle instead of litigate, the English company will offer 10% less than it would ordinarily, as a reduction based on their chances of winning any litigation.

In the case of litigation, the cost for both companies will be their legal costs - up to £2 million on each side (after which further litigation would be irrational) - and there will be costs for the courts in supporting protracting litigation. Courts in the London area cost approximately £18 million to maintain in the year ending 31 March 2008. If only 0.1% of that were spent supporting this litigation, it would amount to £18,000.

In contrast, if the English company took advice from their lawyers that there was only a 1% chance of English law being applied, then the company would only litigate to prevent the loss of £20 million if their legal costs were less than £200,000. In practical terms, this would mean that litigation would never occur. While the English company would thereby be forced to pay an unreduced amount to the Spanish firm, legal costs for both sides would be minimal, as there would be little motivation to litigate. Equally, the courts would not be required to support the litigation.

This very simple example fails to take into account a number of important variables, such as the award of legal costs and any ongoing relationship between the parties. Nevertheless, it indicates how, over many transactions and disputes, greater legal certainty in choice of law can result in reduced costs for parties and the courts.

## **Options**

32. There are two options:

- to remain outside the Regulation by not opting in; or
- to seek the consent of the European Commission to opt in.

### **Option 1 – ‘Do nothing’: Remain Outside the Regulation**

#### *The Current System*

33. The UK is party, along with the other Member States of the EU, to the 1980 Rome Convention on the Law Applicable to Contractual Obligations. This has been implemented into UK law by the Contracts (Applicable Law) Act 1990, which came into force in 1991. The Convention provides a body of harmonised choice of law rules for Member States.

#### *Benefits and Costs*

34. The main advantage of remaining with the Convention is that nothing needs to be changed. Current legislation would remain intact.
35. Remaining with the Convention, however, could result in significant disadvantages. It could lead to a new and undesirable complexity for British business in having to operate two different sets of choice of law rules: one for proceedings brought in the UK (under the

Convention) and another for proceedings brought in the courts of other Member States (under the Regulation).

36. The latter situation would arise whenever a British business finds itself involved in contractual proceedings in the courts of any other Member State (except Denmark, which is excluded under its own Title IV protocol). This would be particularly true in respect of Article 6 of the Regulation (consumer contracts) and does not aid better regulation. There would also be a disadvantage in that the UK would not benefit from those improvements in the Regulation that will bring greater clarity and legal certainty in this area of law. In particular, UK business would not enjoy any benefits arising from improved language, or from judgments of the European Court of Justice that are based on the Rome I Regulation.
37. Although there would not be any additional costs arising directly from the Convention, there could be additional costs in terms of operating two sets of choice of law rules. These costs are not easily quantifiable but would certainly affect the legal profession, the financial sector and small and medium sized enterprises.

#### *Delivering this Option*

38. No action would be required, as the current legislation would remain.

<b>Summary of Costs and Benefits of Continued Opt Out from the Rome I Regulation</b>	
<i>Benefits</i>	<i>Costs</i>
No need for legislative change	<p>Some adjustment costs (as the Regulation applies throughout the rest of the EU)</p> <p>Cost to business of applying two sets of choice of law rules</p> <p>Continued uncertainty about legal interpretation of some aspects of the Rome Convention</p>

## **Option 2 – Opt In**

### *The Regulation*

39. The aim of the Regulation is to convert the 1980 Rome Convention into an EC Regulation with updating where necessary. The intended result is to establish uniform choice of law rules within Member States that can be easily amended in the future. The European Court of Justice will have jurisdiction over interpretation, in order to facilitate the application of standardised conflict rules across all participating Member States.

### *Benefits*

40. The Rome I Regulation will bring greater clarity and legal certainty. This is evident in a number of provisions:

- Article 3 on freedom of choice provides greater clarity in the application of rules while maintaining the necessary flexibility;
- a more simply structured Article 4 also represents an improvement on the Convention and brings the benefit of a more appropriate and reasonably predictable balance between the competing objectives of certainty and flexibility; and
- the positive rule now established under Article 9(3) enables its application in a uniform way across all Member States.

Overall, the Regulation offers an appropriate level of party autonomy. In addition, it provides appropriate protection for weaker parties, adequate certainty on the applicable law and an appropriate level of flexibility.

41. As it is a Community Regulation, it will be easier to modify Rome I in the future using the resources and mechanisms of the European Community than it would be to renegotiate the Rome Convention. As a result, the Regulation is better suited to future change, should it be necessary.

#### *Costs*

42. Costs to the legal profession, the financial sector and small and medium sized enterprises are likely to be minor adjustment costs as the new rules come into force and will be incurred whether or not the UK opts in. The Regulation is likely to bring savings in the longer term due to the greater clarity and legal certainty it will bring. Foreign passenger carriers will no longer be able to choose English law in all circumstances, leading to the potential for a small loss of business for UK law firms.

#### *Delivering this Option*

43. The Regulation will be binding and directly applicable if the UK elects to opt in. In seeking to opt in to the Regulation, the UK will need to request the permission of the European Commission. In the interests of consistency and simplicity, rules of national law which conflict with the Regulation would need to be replaced.

<b>Summary of Costs and Benefits of Opting In to the Rome I Regulation</b>	
<i>Benefits</i>	<i>Costs</i>
Continued Europe-wide uniformity Greater clarity (eg. Articles 3 and 4) Greater legal certainty (eg. Article 4) Decreased legal costs (due to certainty and clarity) Greater capacity for reform	Some adjustment costs (though some will be incurred regardless)  Small potential loss of business to UK law firms from foreign passenger carriers

44. A comparison of the two options reveals that Option 2 – Opt In is preferable to the alternative. It brings benefits in terms of legal certainty and clarity, and maintains the benefits of Europe-wide uniformity presently enjoyed.

## Application within the UK

45. The Rome I Regulation leaves internal choice of law rules to be determined by Member States, reflecting the position under the Rome Convention. The Contracts (Applicable Law) Act 1990 applied the Rome Convention rules between jurisdictions internal to the UK, as well as with foreign jurisdictions, thereby ensuring a single set of choice of law rules throughout the UK. The policy established then has proven successful, and there seem to be no special reasons to apply a different policy under the Rome I Regulation. The analysis in this Impact Assessment regarding the benefits and costs of the Rome I Regulation is equally applicable to the question of whether or not to apply the Regulation to intra-UK issues. The Regulation would bring benefits of clearer wording and structure, as well as uniformity, if applied to cross-border choice of law issues within the UK. Accordingly, the Government considers that rules based on Rome I Regulation should be applied to intra-UK conflict of laws issues.

## Small Firms Impact Test (SFIT)

46. Throughout negotiations, the Government has consulted with the Small Business Service and the Federation of Small Business. Their earlier concerns with the Commission's original proposal appear to be satisfied in the final text of the proposed Regulation.
47. Failing to opt in to the Regulation would lead to higher compliance costs for small and medium enterprises as they would be required to address two sets of laws: the Regulation and the Convention. This is particularly the case for small traders selling both locally and to other Member States.
48. Opting in should maintain lower costs in the longer term. The application of a European Union-wide system would ensure trade with other Member States continues to be simple for small and medium sized enterprises. We would particularly welcome comments from small businesses and their representatives on the impact of the Rome I Regulation.

## Competition Assessment

49. The final text of the Rome I Regulation is very similar to the Rome Convention in terms of its impact on competition. The uniform application of the rules on applicable law should ensure that a level playing field is provided by the Rome I Regulation.
50. Failure to opt in could result in a comparative disadvantage for UK firms trading locally and in Europe. These companies, unlike their equivalents in other member states would be required to address two sets of choice of law rules on a regular basis.
51. Opting in is unlikely to have any effect on competition. The same rules will be applicable throughout the European Union for all cross-border transactions. The rules have not changed significantly enough to have an effect on competition with States outside the EU.

## Other Impacts

### Legal Aid

52. We do not consider that the proposals will have any impact on legal aid expenditure.

## **Sustainable Development**

53. Having read and followed the guidance, including the screening against the five principles of sustainable development, the Ministry of Justice is satisfied that there will be no impact on the environment.

## **Carbon Assessment**

54. Having assessed this proposal against the DEFRA guidance on carbon assessment, the Ministry of Justice does not consider that opting in to the Rome I Regulation will have any effect on emissions of greenhouse gases. We have not, therefore, conducted a full carbon impact assessment.

## **Other Environment**

55. This proposal has been screened against the DEFRA guidance on environmental impact and the questions on greenhouse gas emissions, climate change, waste management, air quality, landscape change, water pollution, habitat or wildlife and noise. The Ministry of Justice is satisfied that there are no significant impacts.

## **Health Impact Assessment**

56. The Ministry of Justice has concluded that a health impact assessment is not necessary. The proposal will not have a significant effect on human health or have an effect on the wider determinants of health. In addition, it will not impact on the lifestyle-related variables provided in the guidance or on health or social care services.

## **Race/Disability/Gender Equality Assessment**

57. On carrying out a screening exercise for race, disability and gender there was no evidence to suggest that opting in to the Rome I Regulation would have any specific race, disability, gender or equality effects. Consequently, the Ministry of Justice has decided that a full equality impact assessment is not required.

## **Human Rights**

58. Having regard to the guidance on this specific impact test from the Cabinet Office, the Ministry of Justice considers this proposal to be human rights compliant and will not result in any restriction of these rights.

## **Rural Proofing**

59. Having screened this proposal against the rural proofing guidance, the Ministry of Justice considers that opting in to the Rome I Regulation will have no significant or different impact on rural areas.

## **Enforcement, Sanctions and Monitoring**

60. The decision to opt in or not does not require any specific enforcement, sanction or monitoring mechanisms. The Regulation will be applied by the courts on a case by case basis, where issues of applicable law arise.

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

<b>Type of testing undertaken</b>	<b><i>Results in Evidence Base?</i></b>	<b><i>Results annexed?</i></b>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No



## **Annex B –Text of the Rome I Regulation as at 1 April 2008**

### **REGULATION (EC) No .../2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of**

**on the law applicable to contractual obligations (Rome I)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee<sup>11</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>12</sup>,

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<sup>11</sup> OJ C 318, 23.12.2006, p. 56.

<sup>12</sup> Opinion of the European Parliament of 29 November 2007 (not yet published in the Official Journal) and Council Decision of ....

Whereas:

- (1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.
- (2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.
- (3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.
- (4) On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters<sup>13</sup>. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.
- (5) The Hague Programme<sup>14</sup>, adopted by the European Council on 5 November 2004, called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations ("Rome I").
- (6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.
- (7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>15</sup> ("Brussels I") and Regulation (EC) No 864/2007 of the European

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<sup>13</sup> OJ C 12, 15.1.2001, p. 1.

<sup>14</sup> OJ C 53, 3.3.2005, p. 1.

<sup>15</sup> OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)<sup>16</sup>.

- (8) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.
- (9) Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character.
- (10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.
- (11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.
- (12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.
- (13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.
- (14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.
- (15) Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations<sup>17</sup> ("the Rome Convention"), the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007.

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<sup>16</sup> OJ L 199, 31.7.2007, p. 40.

<sup>17</sup> OJ C 334, 30.12.2005, p. 1.

- (16) To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.
- (17) As far as the applicable law in the absence of choice is concerned, the concept of "provision of services" and "sale of goods" should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.
- (18) As far as the applicable law in the absence of choice is concerned, multilateral systems should be those in which trading is conducted, such as regulated markets and multilateral trading facilities as referred to in Article 4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments<sup>18</sup>, regardless of whether or not they rely on a central counterparty.
- (19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.
- (20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.
- (21) In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether

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<sup>18</sup> OJ L 145, 30.4.2004, p. 1. Directive as last amended by Directive 2007/44/EC (OJ L 247, 21.9.2007, p. 1).

the contract in question has a very close relationship with another contract or contracts.

- (22) As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term "consignor" should refer to any person who enters into a contract of carriage with the carrier and the term "the carrier" should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.
- (23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.
- (24) With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that "for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities". The declaration also states that "the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor."
- (25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.
- (26) For the purposes of this Regulation, financial services such as investment services and activities and ancillary services provided by a professional to a consumer, as

referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)<sup>19</sup>, should be subject to Article 6 of this Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services.

- (27) Various exceptions should be made to the general conflict-of-law rule for consumer contracts. Under one such exception the general rule should not apply to contracts relating to rights *in rem* in immovable property or tenancies of such property unless the contract relates to the right to use immovable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis<sup>20</sup>.
- (28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Likewise, whenever such instruments are issued or offered, the contractual relationship established between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the country of habitual residence of the consumer, as there is a need to ensure uniformity in the terms and conditions of an issuance or an offer. The same rationale should apply with regard to the multilateral systems covered by Article 4(1)(h), in respect of which it should be ensured that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within those systems or with the operator of such systems.
- (29) For the purposes of this Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscription and redemption of units in collective investment undertakings should include the terms governing, *inter alia*, the allocation of securities or units, rights

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<sup>19</sup> OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2005/1/EC of the European Parliament and of the Council (OJ L 79, 24.3.2005, p. 9).

<sup>20</sup> OJ L 280, 29.10.1994, p. 83.

in the event of over-subscription, withdrawal rights and similar matters in the context of the offer as well as those matters referred to in Articles 10, 11, 12 and 13, thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law.

- (30) For the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.
- (31) Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2, point (a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems<sup>21</sup>.
- (32) Owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders. Therefore, Article 6 should not apply in the context of those particular contracts.
- (33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States.
- (34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>22</sup>.
- (35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.
- (36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

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<sup>21</sup> OJ L 166, 11.6.1998, p. 45.

<sup>22</sup> OJ L 18, 21.1.1997, p. 1.

- (37) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of "overriding mandatory provisions" should be distinguished from the expression "provisions which cannot be derogated from by agreement" and should be construed more restrictively.
- (38) In the context of voluntary assignment, the term "relationship" should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term "relationship" should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.
- (39) For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation.
- (40) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)<sup>23</sup>.

- (41) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To

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<sup>23</sup> OJ L 178, 17.7.2000, p. 1.

make the rules more accessible, the Commission should publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

- (42) The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations.
- (43) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain its objective.
- (44) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified its wish to take part in the adoption and application of the present Regulation.
- (45) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (46) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

## **Chapter I**

### **Scope**

#### *Article 1* *Material Scope*

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.  
  
It shall not apply, in particular, to revenue, customs or administrative matters.
2. The following shall be excluded from the scope of this Regulation:
  - (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
  - (b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
  - (c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
  - (d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
  - (e) arbitration agreements and agreements on the choice of court;
  - (f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;

- (g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
  - (h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
  - (i) obligations arising out of dealings prior to the conclusion of a contract;
  - (j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance<sup>24</sup> the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.
3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.
4. In this Regulation, the term "Member State" shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

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<sup>24</sup> OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2007/44/EC.

*Article 2*

*Universal application*

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

**Chapter II**  
**Uniform rules**

*Article 3*

*Freedom of choice*

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.
5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

*Article 4*  
*Applicable law in the absence of choice*

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
  - (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
  - (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
  - (c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

- (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
  - (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
  - (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
  - (g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
  - (h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.
2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

*Article 5*  
*Contracts of carriage*

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.
2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

- (a) the passenger has his habitual residence; or
  - (b) the carrier has his habitual residence; or
  - (c) the carrier has his place of central administration; or
  - (d) the place of departure is situated; or
  - (e) the place of destination is situated.
3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

*Article 6*  
*Consumer contracts*

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession ("the consumer") with another person acting in the exercise of his trade or profession ("the professional") shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

- (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- (b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.
3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.
4. Paragraphs 1 and 2 shall not apply to:
  - (a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

- (b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours<sup>25</sup>;
- (c) a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;
- (d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;
- (e) a contract concluded within the type of system falling within the scope of Article 4(1), point (h).

*Article 7*  
*Insurance contracts*

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

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<sup>25</sup> OJ L 158, 23.6.1990, p. 59.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance<sup>26</sup> shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:
- (a) the law of any Member State where the risk is situated at the time of conclusion of the contract;
  - (b) the law of the country where the policy holder has his habitual residence;
  - (c) in the case of life assurance, the law of the Member State of which the policy holder is a national;
  - (d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

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<sup>26</sup> OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/68/EC of the European Parliament and of the Council (OJ L 323, 9.12.2005, p. 1).

- (e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:
  - (a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;
  - (b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.
  
6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services<sup>27</sup> and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

*Article 8*  
*Individual employment contracts*

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

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<sup>27</sup> OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2005/14/EC of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 14).

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

*Article 9*  
*Overriding mandatory provisions*

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

*Article 10*  
*Consent and material validity*

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

*Article 11*  
*Formal validity*

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.
3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.
4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.
5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:
  - (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract, and
  - (b) those requirements cannot be derogated from by agreement.

*Article 12*  
*Scope of the law applicable*

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
  - (a) interpretation;
  - (b) performance;
  - (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
  - (d) the various ways of extinguishing obligations, and prescription and limitation of actions;
  - (e) the consequences of nullity of the contract.
  
2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

*Article 13*  
*Incapacity*

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

*Article 14*  
*Voluntary assignment and contractual subrogation*

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person ("the debtor") shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.
2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.
3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

*Article 15*  
*Legal subrogation*

Where a person ("the creditor") has a contractual claim against another ("the debtor") and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

*Article 16*  
*Multiple liability*

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

*Article 17*  
*Set-off*

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

*Article 18*  
*Burden of proof*

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

### **Chapter III** **Other provisions**

#### *Article 19* *Habitual residence*

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

*Article 20*  
*Exclusion of renvoi*

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

*Article 21*  
*Public policy of the forum*

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

*Article 22*  
*States with more than one legal system*

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

*Article 23*

*Relationship with other provisions of Community law*

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

*Article 24*

*Relationship with the Rome Convention*

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.
2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

*Article 25**Relationship with existing international conventions*

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.
2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

*Article 26**List of Conventions*

1. By ...\*, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.
2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the Official Journal of the European Union:
  - (a) a list of the conventions referred to in paragraph 1;
  - (b) the denunciations referred to in paragraph 1.

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\* OJ: Please insert the date 12 months after the date of adoption of this Regulation.

*Article 27*  
*Review clause*

1. By ...<sup>\*</sup>, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:
  - (a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and
  - (b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.
  
2. By...<sup>\*\*</sup>, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

*Article 28*  
*Application in time*

This Regulation shall apply to contracts concluded after ...<sup>\*\*\*</sup>.

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<sup>\*</sup> OJ: Please insert the date five years after the date of adoption of this Regulation.

<sup>\*\*</sup> OJ: Please insert the date two years after the date of adoption of this Regulation.

<sup>\*\*\*</sup> OJ: Please insert the date 18 months after the date of adoption of this Regulation.

## **Chapter IV**

### **Final provisions**

*Article 29*  
*Entry into force and application*

This Regulation shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

It shall apply from ... \* except for Article 26 which shall apply from ...\*\*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

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\* OJ: Please insert the date 18 months after the date of adoption of this Regulation.

\*\* OJ: Please insert the date 12 months after the date of adoption of this Regulation.



## **Annex C – Consolidated Text of the Rome Convention 1980**

*Official Journal C 027 , 26/01/1998 p. 0034 - 0046*

### **PRELIMINARY NOTE**

The signing on 29 November 1996 of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Rome Convention on the law applicable to contractual obligations and to the two Protocols on its interpretation by the Court of Justice has made it desirable to produce a consolidated version of the Rome convention and of those two Protocols.

These texts are accompanied by three Declarations, one made in 1980 with regard to the need for consistency between measures to be adopted on choice-of-law rules by the Community and those under the Convention, a second, also made in 1980, on the interpretation of the Convention by the Court of Justice and a third, made in 1996, concerning compliance with the procedure provided for in Article 23 of the Rome Convention as regards carriage of goods by sea.

The text printed in this edition was drawn up by the General Secretariat of the Council, in whose archives the originals of the instruments concerned are deposited. It should be noted, however, that this text has no binding force. The official texts of the instruments consolidated are to be found in the following Official Journals.

#### **ANNEX**

**CONVENTION** on the law applicable to contractual obligations (1) opened for signature in Rome on 19 June 1980

#### **PREAMBLE**

**THE HIGH CONTRACTING PARTIES** to the Treaty establishing the European Economic Community,

**ANXIOUS** to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,

**WISHING** to establish uniform rules concerning the law applicable to contractual obligations,

**HAVE AGREED AS FOLLOWS:**

# TITLE I

## SCOPE OF THE CONVENTION

### Article 1 Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;

(b) contractual obligations relating to:

- wills and succession,
- rights in property arising out of a matrimonial relationship,
- rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) arbitration agreements and agreements on the choice of court;

(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;

(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(h) evidence and procedure, without prejudice to Article 14.

3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in those territories the court shall apply its internal law.

4. The preceding paragraph does not apply to contracts of re-insurance.

### Article 2 Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

## TITLE II

### UNIFORM RULES

#### Article 3 Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.
3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules`.
4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

#### Article 4 Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.
2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.
3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.
4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

#### **Article 5 Certain consumer contracts**

1. This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

- if the other party or his agent received the consumer's order in that country, or

- if the contract is for the sale of goods and the consumer travelled from that country to another country

and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

(a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

#### **Article 6 Individual employment contracts**

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

### **Article 7 Mandatory rules**

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

### **Article 8 Material validity**

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.
2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

### **Article 9 Formal validity**

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.
2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.
3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.
4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.
5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.
6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

### **Article 10 Scope of applicable law**

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:
  - (a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

### **Article 11 Incapacity**

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

### **Article 12 Voluntary assignment**

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

### **Article 13 Subrogation**

1. Where a person ('the creditor') has a contractual claim upon another ('the debtor'), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

### **Article 14 Burden of proof, etc.**

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

### **Article 15 Exclusion of convoi**

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

### **Article 16 'Ordre public**

The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum.

**Article 17 No retrospective effect**

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

**Article 18 Uniform interpretation**

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

**Article 19 States with more than one legal system**

**1.** Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

**2.** A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

**Article 20 Precedence of Community law**

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.

**Article 21 Relationship with other conventions**

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

**Article 22 Reservations**

**1.** Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply:

- (a) the provisions of Article 7 (1);
- (b) the provisions of Article 10 (1) (e).

**2.** . . . (2)

**3.** Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

## TITLE III

### FINAL PROVISIONS

#### Article 23

1. If, after the date on which this Convention has entered into force for a Contracting State, that State wishes to adopt any new choice of law rule in regard to any particular category of contract within the scope of this Convention, it shall communicate its intention to the other signatory States through the Secretary-General of the Council of the European Communities.
2. Any signatory State may, within six months from the date of the communication made to the Secretary-General, request him to arrange consultations between signatory States in order to reach agreement.
3. If no signatory State has requested consultations within this period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the Contracting State concerned may amend its law in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States through the Secretary-General of the Council of the European Communities.

#### Article 24

1. If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention, the procedure set out in Article 23 shall apply. However, the period of two years, referred to in paragraph 3 of that Article, shall be reduced to one year.
2. The procedure referred to in the preceding paragraph need not be followed if a Contracting State or one of the European Communities is already a party to the multilateral convention, or if its object is to revise a convention to which the State concerned is already a party, or if it is a convention concluded within the framework of the Treaties establishing the European Communities.

#### Article 25

If a Contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by Article 24 (1), that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

#### Article 26

Any Contracting State may request the revision of this Convention. In this event a revision conference shall be convened by the President of the Council of the European Communities.

#### Article 27 (3)

#### Article 28

1. This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty establishing the European Economic Community.

2. This Convention shall be subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of the European Communities (4).

**Article 29 (5)**

1. This Convention shall enter into force on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval.

2. This Convention shall enter into force for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

**Article 30**

1. This Convention shall remain in force for 10 years from the date of its entry into force in accordance with Article 29 (1), even for States for which it enters into force at a later date.

2. If there has been no denunciation it shall be renewed tacitly every five years.

3. A Contracting State which wishes to denounce shall, not less than six months before the expiration of the period of 10 or five years, as the case may be, give notice to the Secretary-General of the Council of the European Communities. Denunciation may be limited to any territory to which the Convention has been extended by a declaration under Article 27 (2) (6).

4. The denunciation shall have effect only in relation to the State which has notified it. The Convention will remain in force as between all other Contracting States.

**Article 31 (7)**

The Secretary-General of the Council of the European Communities shall notify the States party to the Treaty establishing the European Economic Community of:

- (a) the signatures;
- (b) deposit of each instrument of ratification, acceptance or approval;
- (c) the date of entry into force of this Convention;
- (d) communications made in pursuance of Articles 23, 24, 25, 26 and 30 (8);
- (e) the reservations and withdrawals of reservations referred to in Article 22.

**Article 32**

The Protocol annexed to this Convention shall form an integral part thereof.

**Article 33 (9)**

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy thereof to the Government of each signatory State.

In witness whereof the undersigned, being duly authorized thereto, having signed this Convention.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

*[Signatures of the plenipotentiaries]*

#### **PROTOCOL (10)**

The High Contracting Parties have agreed upon the following provision which shall be annexed to the Convention:

Notwithstanding the provisions of the Convention, Denmark, Sweden and Finland may retain national provisions concerning the law applicable to questions relating to the carriage of goods by sea and may amend such provisions without following the procedure provided for in Article 23 of the Convention of Rome. The national provisions applicable in this respect are the following:

- in Denmark, paragraphs 252 and 321 (3) and (4) of the "Solov" (maritime law),
- in Sweden, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "sjölagen" (maritime law),
- in Finland, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "merilaki"/"sjölagen" (maritime law).

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

*[Signatures of the Plenipotentiaries]*

#### **JOINT DECLARATION**

At the time of the signature of the Convention on the law applicable to contractual obligations, the Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland,

**I.** anxious to avoid, as far as possible, dispersion of choice of law rules among several instruments and differences between these rules, express the wish that the institutions of the European Communities, in the exercise of their powers under the Treaties by which they were established, will, where the need arises, endeavour to adopt choice of law rules which are as far as possible consistent with those of this Convention;

**II.** declare their intention as from the date of signature of this Convention until becoming bound by Article 24, to consult with each other if any one of the signatory States wishes to become a party to any convention to which the procedure referred to in Article 24 would apply;

**III.** having regard to the contribution of the Convention on the law applicable to contractual obligations to the unification of choice of law rules within the European Communities, express the view that any State which becomes a member of the European Communities should accede to this Convention.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

*[Signatures of the Plenipotentiaries]*

#### **JOINT DECLARATION**

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland,

On signing the Convention on the law applicable to contractual obligations;

Desiring to ensure that the Convention is applied as effectively as possible;

Anxious to prevent differences of interpretation of the Convention from impairing its unifying effect;

**Declare themselves ready:**

1. to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect;

2. to arrange meetings at regular intervals between their representatives.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

*[Signatures of the Plenipotentiaries]*

(1) Text as amended by the Convention of 10 April 1984 on the accession of the Hellenic Republic - hereafter referred to as the '1984 Accession Convention` -, by the Convention of 18 May 1992 on the accession of the Kingdom of Spain and the Portuguese Republic - hereafter referred to as the '1992 Accession Convention` - and by the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden - hereafter referred to as the '1996 Accession Convention`.

(2) Paragraph deleted by Article 2 (1) of the 1992 Accession Convention.

(3) Article deleted by Article 2 (1) of the 1992 Accession Convention.

(4) Ratification of the Accession Conventions is governed by the following provisions of those conventions:

- as regards the 1984 Accession Convention, by Article 3 of that Convention, which reads as follows:  
'Article 3

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.` ,

- as regards the 1992 Accession Convention, by Article 4 of that Convention, which reads as follows:  
'Article 4

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.` ,

- as regards the 1996 Accession Convention, by Article 5 of that Convention, which reads as follows:  
'Article 5

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.` .

(5) The entry into force of the Accession Conventions is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 4 of that Convention, which reads as follows:  
'Article 4

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and seven States which have ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1992 Accession Convention, by Article 5 of that Convention which reads as follows:  
'Article 5

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Kingdom of Spain or the Portuguese Republic and by one State which has ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1996 Accession Convention, by Article 6 of that Convention, which reads as follows:  
'Article 6

1. This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Republic of Austria, the Republic of Finland or the Kingdom of Sweden and by one Contracting State which has ratified the Convention on the law applicable to contractual obligations.

2. This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

(6) Phrase deleted by the 1992 Accession Convention.

(7) Notification concerning the Accession Convention is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 5 of that Convention, which reads as follows:  
'Article 5

The Secretary-General of the Council of the European Communities shall notify Signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`,

- as regards the 1992 Accession Convention, by Article 6 of that Convention, which reads as follows:  
'Article 6

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`,

- as regards the 1996 Accession Convention, by Article 7 of that Convention, which reads as follows:

'Article 7

The Secretary-General of the Council of the European Union shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`,

(8) Point (d) as amended by the 1992 Accession Convention.

(9) An indication of the authentic texts of the Accession Convention is to be found in the following provisions:

- as regards the 1984 Accession Convention, in Articles 2 and 6 of that Convention, which reads as follows:

'Article 2

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The text of the Convention on the law applicable to contractual obligations in the Greek language is annexed hereto. The text in the Greek language shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'Article 6

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.`,

- as regards the 1992 Accession Convention, in Articles 3 and 7 of that Convention, which read as follows:

'Article 3

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and the Portuguese Republic.

The text of the Convention on the law applicable to contractual obligations in the Portuguese and Spanish languages is set out in Annexes I and II to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'Article 7

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.`

- as regards the 1996 Accession Convention, in Articles 4 and 8 of that Convention, which read as follows:

'Article 4

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

2. The text of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Finnish and Swedish languages shall be authentic under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992.`

'Article 8

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government of each signatory State.`

**(10) Text as amended by the 1996 Accession Convention**

## Annex D – Comparison Table for Rome Convention and Rome I Regulation

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
<b>Article 1 (Scope)</b>	1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.	1.This Regulation shall apply, in any situation involving a conflict of laws, to contractual obligations in civil and commercial matters.	1.This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.
		It shall not extend, in particular, to revenue, customs or administrative matters.	It shall not apply, in particular, to revenue, customs or administrative matters.
	2. They shall not apply to:	2.The Regulation shall not apply to:	2.This Regulation shall not apply to:
	(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;	(a)questions involving the status or legal capacity of natural persons, without prejudice to Article 12;	(a)questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
	(b) contractual obligations relating to:	(b)contractual obligations relating to a family relationship or a relationship which, in accordance with the law applicable to it, has similar effects, including maintenance obligations;	(b)obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
	- wills and succession	(c)obligations arising out a matrimonial relationship or a property ownership scheme which, under the law applicable to it, has similar effects to a marriage, wills and successions;	(c)obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
	- rights in property arising out of a matrimonial relationship		

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
	- rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;		
	(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;	(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;	(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
	(d) arbitration agreements and agreements on the choice of court;	(e) arbitration agreements and agreements on the choice of court;	(e) arbitration agreements and agreements on the choice of court;
	(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;	(f) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate, the personal liability of officers and members as such for the obligations of the company or body and the question whether a management body of a company or other body corporate or unincorporated can bind the company or body in relation to third parties;	(f) questions governed by the law of companies and other bodies corporate or unincorporated such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporated and the personal liability of officers and members as such for the obligations of the company or body ;

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
	(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;		(g)the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporated, in relation to a third party;
	(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;	(g)the constitution of trusts and the relationship between settlors, trustees and beneficiaries;	(h)the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
	(h) evidence and procedure, without prejudice to Article 14.	(h)evidence and procedure, without prejudice to Article 17;	(i)evidence and procedure, without prejudice to Article 18;
		(i)obligations arising out of a pre-contractual relationship.	(j)obligations arising out of dealings prior to the conclusion of a contract;
	3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in those territories the court shall apply its internal law.		k)insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (moved from p. 14) the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
	4. The proceeding paragraph does not apply to contracts of re-insurance	3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark [,Ireland and the United Kingdom].	3. In this Regulation, the term "Member State" shall mean Member States to which this Regulation applies. However, in Article 3(4) the term shall mean all the Member States.
<b>Article 3 (Freedom of Choice)</b>	1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.	1. Without prejudice to Articles 5, 6 and 7, a contract shall be governed by the law chosen by the parties.	1. A contract shall be governed by the law chosen by the parties.
		The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract behaviour of the parties or the circumstances of the case. If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State.	The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.
		By their choice the parties can select the law applicable to the whole or a part only of the contract.	By their choice the parties can select the law applicable to the whole or a part only of the contract.
		2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community.	

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
		However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.	
	2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.	3. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 10 or adversely affect the rights of third parties.	2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
	3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules'.	4. The fact that the parties have chosen a foreign law in accordance with paragraphs 1 or 2, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".	3. Where all other elements relevant to the situation at the time of the choice are located in a country other than a country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement.

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
		5. Where the parties choose the law of a non-member State, that choice shall be without prejudice to the application of such mandatory rules of Community law as are applicable to the case.	4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate, as implemented in the Member State of the forum, which cannot be derogated from by agreement.
	4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.	6. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 9, 10 and 12.	5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.
<b>Article 4 (Applicable Law in the Absence of Choice)</b>	1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.	1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law determined as follows:	1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
		(a) a contract of sale shall be governed by the law of the country in which the seller has his habitual residence;	(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
		(b)a contract for the provision of services shall be governed by the law of the country in which the service provider has his habitual residence;	(b)a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
	CONTRACTS OF CARRIAGE - SEE ARTICLE 4(4)	(c)a contract of carriage shall be governed by the law of the country in which the carrier has his habitual residence;	CONTRACTS OF CARRIAGE - SEE ARTICLE 5
		(d)a contract relating to a right in rem or right of user in immovable property shall be governed by the law of the country in which the property is situated;	(c)a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
		(e)notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be governed by the law of the country in which the owner has his habitual residence, provided the tenant is a natural person and has his habitual residence in the same country;	(d)notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
		(f)a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence;	

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
		(g) a franchise contract shall be governed by the law of the country in which the franchised person has his habitual residence;	(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
		(h) a distribution contract shall be governed by the law of the country in which the distributor has his habitual residence.	(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
			(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
			(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
	<p>2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.</p>	<p>2. Contracts not specified in paragraph 1 shall be governed by the law of the country in which the party who is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract. Where that service cannot be identified, the contract shall be governed by the law of the country with which it is most closely connected.</p>	<p>2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party who is required to effect the performance of the contract which is characteristic of the contract has his habitual residence.</p>
	<p>3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.</p>		<p>3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.</p>

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
	<p>4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.</p>		<p>4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.</p>
	<p>5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.</p>		

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
<b>Article 5 (Contracts of Carriage)</b> (Article 4(4), Rome Convention; Article 4(1)(c) Commission Proposal)	Article 4(4) - 4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.	Article 4(1)(c): a contract of carriage shall be governed by the law of the country in which the carrier has his habitual residence	1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable to such contracts shall be the law of the country of the habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.
			2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the place where the carrier has his habitual residence shall apply.

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
			<p>The parties may choose as the law applicable to the contract for the carriage of passengers in accordance with Article 3 only the law of the country where:</p> <p>(a) the passenger has his habitual residence; or</p> <p>(b) the carrier has his habitual residence; or</p> <p>(c) the carrier has his place of central administration; or</p> <p>(d) the place of departure is situated; or</p> <p>(e) the place of destination is situated.</p> <p>3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.</p>
<p><b>Article 6 (Consumer Contracts)</b> (Article 5, Rome Convention; Article 5 Commission Proposal)</p>	<p>1. This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.</p>	<p>1. Consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the Member State in which the consumer has his habitual residence.</p>	

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
	2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:	2.Paragraph 1 shall apply to contracts concluded by a natural person, the consumer, who has his habitual residence in a Member State for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession.	1.Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession ("the consumer") with another person acting in the exercise of his trade or profession ("the professional") shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
	- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or	It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.	(a)pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
	- if the other party or his agent received the consumer's order in that country, or		(b)by any means, directs such activities to that country or to several countries including that country,

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
	- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.		and the contract falls within the scope of such activities.
	3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.		2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by such provisions that cannot be derogated from by contract by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.
			3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.
	4. This Article shall not apply to:	3. Paragraph 1 shall not apply to:	4. Paragraphs 1 and 2 shall not apply to:
	(a) a contract of carriage;	(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;	(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
	(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.	(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;	(b)a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours;
		(c) contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.	(c)a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;
			(d)rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;
			(e)a contract concluded within the type of system falling within the scope of Article 4(1)(h).
	5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.		

	Rome Convention	Commission Proposal	Final Position
<b>Article 7 (Insurance Contracts)</b>			<p>1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.</p> <p>2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3.</p> <p>To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.</p> <p>3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:</p>

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
			<p>(a) the law of any Member State where the risk is situated at the time of the conclusion of the contract;</p> <p>(b) the law of the country where the policy holder has his habitual residence;</p> <p>(c) in the case of life insurance, the law of the Member State of which the policy holder is a national;</p> <p>(d) for insurance contracts covering risks limited to events occurring in one Member State, other than the Member State where the risk is situated, the law of that Member State;</p> <p>(e) where the policy holder by virtue of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country in which the habitual residence of the policy holder is situated.</p> <p>Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.</p>

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
			<p>To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of the conclusion of the contract.</p> <p>4. The following additional rules shall apply to insurance contracts for which a Member State imposes an obligation to take out insurance:</p> <p>(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;</p> <p>(b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.</p>

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
			<p>5. For the purposes of paragraph 3, last subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.</p> <p>6. For the purposes of this Article, the country in which the risk is situated is determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and, in the case of life insurance, the country where the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.</p>

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
<b>Article 9 (Overriding Mandatory Provisions)</b> (Article 7, Rome Convention; Article 8, Commission Proposal)	1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.	1.Mandatory rules are rules the respect for which is regarded as crucial by a country for safeguarding its political, social or economic organisation to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.	1.Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
	2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.	2.Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory.	2.Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
		3.Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties.	3.Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

	<b>Rome Convention</b>	<b>Commission Proposal</b>	<b>Final Position</b>
<b>Article 14 (Voluntary assignment and subrogation),</b> (Article 12, Rome Convention; Article 13, Commission Proposal)	1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.	1.The mutual obligations of assignor and assignee under a voluntary assignment or contractual subrogation of a right against another person shall be governed by the law which under this Regulation applies to the contract between the assignor and assignee.	1.The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person ("the debtor") shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.
	2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.	2.The law governing the original contract shall determine the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.	2.The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.
		3.The question whether the assignment or subrogation may be relied on against third parties shall be governed by the law of the country in which the assignor or the author of the subrogation has his habitual residence at the material time.	3.The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.



## Annex E – List of Consultees

<b>ORGANISATION</b>
Addleshaw and Goddard LLP
ADR Group
Aldbourne Parish Council
Allen & Overy
Alternative Family Law
Amazon.co.uk
Association of British Insurers
Association of Corporate Treasurers
Association of Personal Injury Lawyers
Attorney General's Office
Bar Council
Barclays
Bird and Bird
Brickcourt Chambers
British Bankers Association
British Chamber of Commerce
British Exporters Association
British Institute of International and Comparative Law (BIICL)
British Retail Consortium
British Retail Consortium
British Shipping Organisation
Cameron McKenna
Cambridge University
Centre for Effective Dispute Resolution
Chartered Institute of Arbitrators
Citizen's Advice Bureau
City of London Law Society
City Rembrancer
City of Westminster & Holborn Law Society
Civil Court Users' Association
Clifford Chance LLP
Commercial Bar Association
Compulink Information Exchange (LIX)
Confederation of British Industry
Construction Confederation
Consumer Credit Trade Association
Consumers Association/Which
Council of Mortgage Lenders
Denison Till
Dumfries & Galloway DC
E-Business Regulatory Alliance
European Digital Media Association
Essex Court Chambers
Faculty of Advocates
Federation of Small Business
Financial Market Law Committee (Bank of England)

<b>ORGANISATION</b>
Financial Services Authority
Freshfields
Futures and Options Association
Gard (UK) Limited
Hertz Europe Ltd
Hill Dickinson
Institute of Chartered Accountants of Scotland (ICAS)
Institute of Directors
Institute of Purchasing & Supply
International Chamber of Commerce
International Chamber of Shipping
International Group of Protection & Indemnity Clubs
International Swaps and Derivatives Association
International Underwriting Association
Interval International Ltd
Investment Management Association
King's College London
Kingfishers
Law Commission
Law Society
Linklaters
Lloyds TSB
Loan Market Association
London Investment Banking Association
Lord Mance
Martineau Johnson
Monckton Chambers
Morgan Stanley
Nabarro Nathanson
National Consumer Council
Newspaper Society
Oxford University
Pan European Association of Personal Injury Lawyers
Periodical Publishers Association
Pharmaceutical Group of the European Union
Provident Financial
Rawlings Giles & Sher
Registers of Scotland
Resolution
Rosling King
Scottish Chambers of Commerce
Scottish Financial Enterprise
Scottish Parliament's Justice Committee
Shadbolts
Sidley Austin
Simmons & Simmons
Slaughter and May
Trade Union Congress
UK Trade and Investment
University College London

<b>ORGANISATION</b>
University of Aberdeen
University of Birmingham
University of Dundee
University of Edinburgh
University of Glasgow
University of Stirling
University of Strathclyde
Wragge & Co
Cabinet Office
Department of Finance and Personnel for Northern Ireland
Department for Business, Enterprise & Regulatory Reform
Department for Transport
Financial Services Authority
HM Treasury
Scottish Executive
UKREP

